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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 89.

OTTO GROECK AND JENNIE L. MERRILL AND LEN HERRIFORD, EXECUTRIX AND EXECUTOR OF C. S. MERRILL, DECEASED, APPELLANTS,

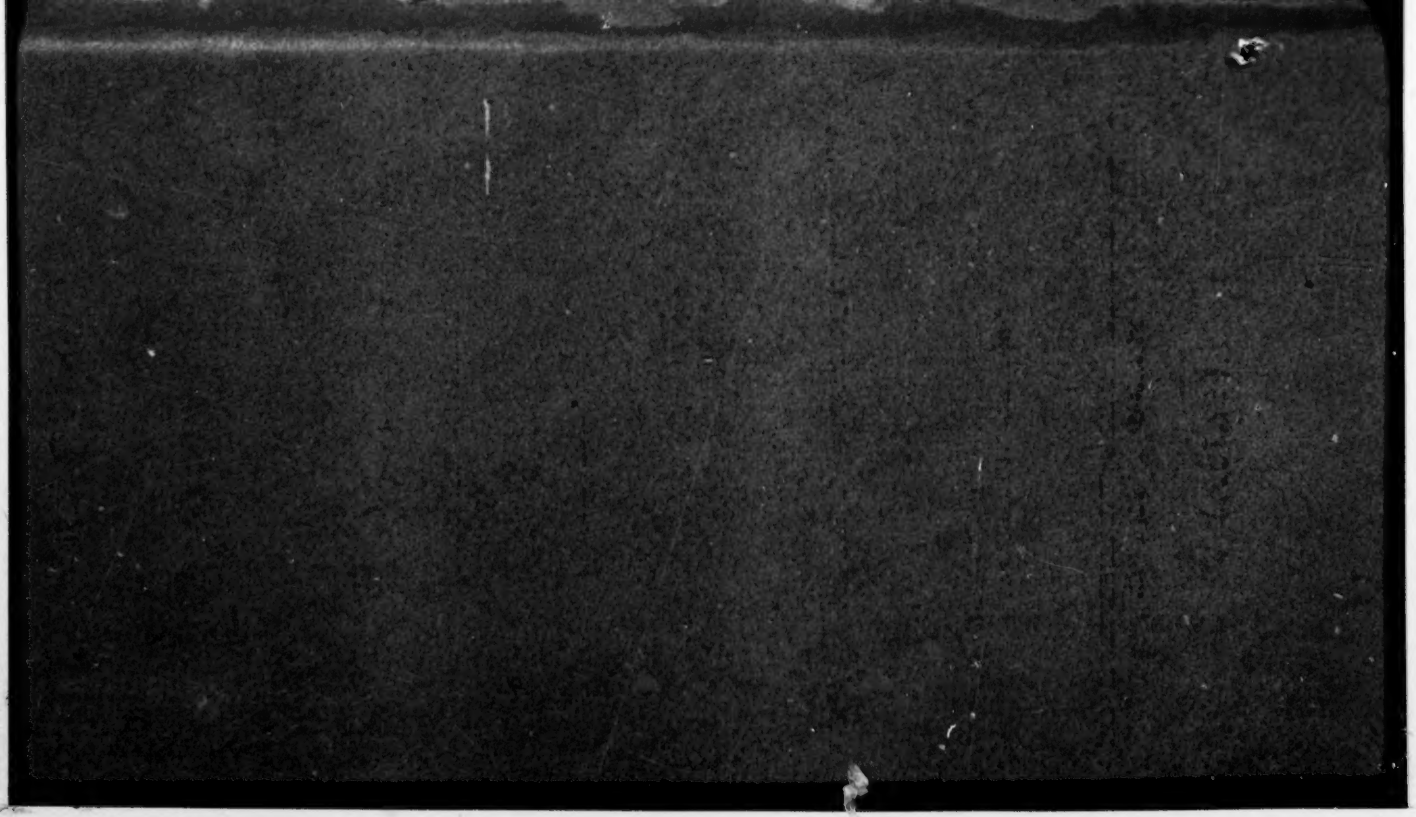
*vs.*

THE SOUTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JUNE 14, 1900.

(17,799.)



# (17,799.)

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1900.

No. 314.

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OTTO GROECK AND JENNIE L. MERRILL AND LEN HERRIFORD, EXECUTRIX AND EXECUTOR OF C. S. MERRILL, DECEASED, APPELLANTS,

*vs.*

THE SOUTHERN PACIFIC RAILROAD COMPANY.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1900.

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*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

OTTO GROECK, JENNY L. MERRILL and LEM HERIFORD, as Executors of the Estate of C. S. MERRILL, Jr., Deceased,

Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,

Appellee.

## Order Extending Time to Docket Cause.

An appeal having been allowed on the fifth day of June, 1899, by the Circuit Court of the United States, for the Southern District of California, to the Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, from a final decree on the thirty-first day of May, 1899, filed and entered of record in said Circuit Court, and on the first day of July, 1899, I, Erskine M. Ross, United States Circuit Judge for the Ninth Circuit, having signed the citation in said cause, which citation was made returnable on the fifth day of July, 1899, and good cause now having been shown, and pursuant to the authority vested in me by subdivision one (1) of rule sixteen (16) of the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

It is ordered that the time heretofore allowed said appellants to docket said cause and file the record thereof with the clerk of said United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is enlarged and extended until and including the fourth day of August, 1899.

Dated at Los Angeles, California, July 3, 1899.

ROSS,

United States Circuit Judge for the Ninth Circuit.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Otto Groeck et al., vs. Southern Pacific Railroad Co. Order extending time to file transcript.

Filed July 3, 1899. Wm. M. Van Dyke, Clerk, Chas. N. Williams, Deputy.

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*In the United States Circuit Court of Appeals, Ninth Circuit.*

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. MERRILL, Deceased,

Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,

Appellee.

**Citation.**

To Southern Pacific Railroad Company:

You are hereby cited and admonished to be and appear

at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the fifth day of July, A. D. 1899, pursuant to an order allowing an appeal, entered in the clerk's office of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, from a final decree made and entered on the thirty-first day of May, 1899, in that certain cause, being in equity No. —, wherein the Southern Pacific Railroad Company is complainant and Otto Groeck and Jennie L. Merrill and Len Herriford, executrix and executor of the estate of C. S. Merrill, deceased, are defendants, to show cause, if any there be, why the said decree rendered against said appellants as in the said order allowing the appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this first day of July, A. D. 1899, and of the independence of the United States the one hundred and twenty-fourth.

ROSS,
United States Circuit Judge.

Due service admitted.

WM. SINGER, Jr.,
Attorney for S. P. R. R. Co.

[Endorsed]: *No. 347.* In United States Circuit Court of Appeals, Ninth Circuit. Otto Groeck et el. vs. S. P. R. R. Co. Citation.

Filed July 5, 1899. Wm. M. Van Dyke, Clerk, Chas. N. Williams, Deputy.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

**IN EQUITY.**

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Defendants.

## Amended Bill of Complaint.

The amended bill of complaint of the Southern Pacific Railroad Company, plaintiff, against Otto Groeck and C. S. Merrill, Jr., defendants; filed by leave of the Court.

To the Honorable Judges of the Circuit Court of the United States, for the Ninth Circuit, Southern District of California:

Your orator, the Southern Pacific Railroad Company, complaining, says:

I.

That your orator is, and at all the times hereinafter mentioned was, a private corporation, duly incorporated by and in virtue of the general laws of the State of California, and a citizen of said State; and Otto Groeck and C. S. Merrill, Jr., defendants, each is a citizen of the State of California, and inhabitant of the Southern District of California.

II.

The matter in dispute in this suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and, as will be hereinafter shown, arises under the laws of the United States.

III.

By an act of Congress of the United States, approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," your orator was authorized and empowered to connect with the Atlantic & Pacific Railroad, at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco, and to construct a railroad from such point to the city of San Francisco.

To aid in the construction of the said railroad, the said act of the Congress made a grant to your orator of every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad, when constructed. And in this behalf the said act further provided that, whenever, prior to said time, any of the said sections were granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands should be selected by your orator in lieu thereof, under the direction of the Secretary of the Interior, from the odd-numbered sections not more than ten miles beyond the limits of the first mentioned odd-numbered sections. The said act, among other matters, further provided (by

section 6 thereof), that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route should be fixed, and as fast as might be required by the construction of said railroad; and that the odd sections of land thereby granted should not be liable to sale or entry, or pre-emption, before or after they were surveyed, except by your orator, as provided in the said act.

Your orator refers to the said act of the Congress, as printed in the XIV U. S. Statutes at Large, at page 292 and following, and makes the said act, and the whole thereof, a part of this bill of complaint.

The act of the Congress approved July 25, 1868, entitled "An act to extend the time for the construction of the Southern Pacific Railroad in the State of California," provided that your orator have until July 1, 1870, for the construction of the first thirty miles of said railroad; that it be required to construct at least twenty miles every year thereafter, and the whole line of road within the time then provided by law, namely, on or before July 4, 1878.

IV.

On December 27, 1866, your orator duly accepted the terms, conditions and impositions of the said act of July 27, 1866, and deposited such acceptance in the office of the Secretary of the Interior; which acceptance was in writing, under its corporate seal, and was duly executed pursuant to the direction of its board of directors, theretofore made.

V.

On or before January 3, 1867, your orator duly fixed the general route of the entire line of the railroad which it was authorized by the said act of July 27, 1866, to construct, and on January 3, 1867, the line of the said road was designated by a plat thereof filed on that day in the office of the Commissioner of the General Land Office. The said general route, plat and designation of line, were duly approved and accepted by the Secretary of the Interior and the Commissioner of the General Land Office; and on March 22, 1867, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, dated March 19, 1867, withdrew the odd-numbered sections of land within thirty miles of the railroad line shown upon the said plat, from sale or location, pre-emption or homestead entry. A copy of the said order of March 22, 1867, is hereto attached, marked "Exhibit A," and made a part of this amended bill.

The said order of withdrawal has ever since continued and still continues in full force and effect, except in so far as, if at all, the same may have been affected by orders of the Secretary of the Interior dated, respectively, November 2, 1869, directing restoration of the said lands, and August 15, 1887, directing restoration of all lands withdrawn and held for indemnity purposes under the said grant to your orator. Your orator is advised and believes, and therefore says, that neither the said order of November 2, 1869, nor the said order of August 15, 1887, in anywise affected the provisions of the sixth section of the said act of July 27, 1866; and that the said orders did

not and could not, make the said lands in anywise liable to sale, entry or pre-emption, except by your orator.

The said order of November 2, 1869, directing restoration of the said lands, was indefinitely suspended by the order of the Secretary of the Interior, dated December 15, 1869.

On June 28, 1870, a joint resolution was adopted by the Congress of the United States, entitled "Joint resolution concerning the Southern Pacific Railroad of California," approved June 28, 1870; which joint resolution is printed in the sixteenth Statute at Large, page 382, and is hereby referred to and made a part of this amended bill.

On July 26, 1870, and July 29, 1870, respectively, the Secretary of the Interior and the Commissioner of the General Land Office ordered and directed that the order of the Commissioner of the General Land Office of March 22, 1867, hereinbefore referred to, should be respected; a copy of each of which orders is hereto attached, marked, respectively, "Exhibit B" and "Exhibit C," and made a part of this amended bill.

VI.

Your orator constructed the first section of its railroad, extending from San Jose, in a southerly direction through the town of Gilroy, to a point distant more than thirty miles from San Jose, prior to July 1, 1870; and within the next year thereafter constructed the twenty miles section of said railroad extending from the last mentioned point to Tres Pinos. Thereafter, and prior to July 4, 1878, your orator constructed that portion of its railroad extending from Huron to Mojave, a distance of one hun-

dred and eighty-two miles; and constructed its railroad extending from Mojave to the Needles, where it connects with the Atlantic & Pacific Railroad, in several sections and at different times subsequent to July 4, 1878, and prior to the year 1885, and constructed the section of said railroad which extends from Huron westerly to Alcalde, during the year 1888.

All of said railroad was constructed along the line designated therefor on the said plat of general route, filed January 3, 1867.

All of the said railroad was so constructed and equipped in a good, substantial and workmanlike manner, in all respects as required by the said acts of the Congress. Commissioners, duly appointed by the President of the United States, examined the said railroad after it was completed in sections as aforesaid, and duly reported to the President of the United States that all of the said railroad had been completed in a good, substantial and workmanlike manner, in all respects as required by the said acts of the Congress.

The President of the United States duly accepted and approved the said reports, as follows: Of the first thirty miles section of railroad, extending from San Jose through Gilroy, on August 7, 1871; of the second section of railroad, extending from near Gilroy to Tres Pinos, on October 26, 1871; of the several sections extending from Huron to Mojave, at various dates between October 26, 1871, and January 31, 1878; and the section of railroad extending from Huron westerly to Alcalde, on November 8, 1889.

VII.

Your orator filed plats in the General Land Office and Department of the Interior, showing the line of its said railroad as definitely located and constructed, on the following dates: Of the first thirty-miles section of railroad, extending from San Jose through Gilroy, on August 7, 1871; of the section of railroad extending from near Gilroy to Tres Pinos, on October 20, 1871; of the several sections of railroad extending from Huron to Mojave, at various dates between October 26, 1871, and January 31, 1878; of the several sections of railroad extending from Mojave to the Needles, at various dates between January 31, 1878, and December 31, 1884; and of the section of railroad extending from Huron westerly to Alcalde, on April 2, 1889.

VIII.

The east half of the southwest quarter of section 19, in township 8 south, range 1 east, Mount Diablo base and meridian, is part of an odd-numbered section, within twenty miles, on the west side, of the first section of said railroad, which extends from San Jose through Gilroy. The said tract was granted to the Central Pacific Railroad Company of California by the act of Congress of the United States approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," prior to the time when your orator's railroad was designated by a plat thereof filed in the office of the Commissioner of the General Land Office;

which act is printed in twelfth United States Statute at Large, at page 489 and following.

IX.

The south half of the southeast quarter of section 17, in township 24 south, range 17 east, Mount Diablo base and meridian, is situated in Kings county, and within the Southern District of California.

The said tract is part of an odd-numbered section, distant more than twenty miles from, but lying within thirty miles of, the line of road designated on the said plat thereof, filed January 3, 1867, and the said road definitely located and constructed; and is opposite to and coterminous with the section of said railroad which extends from Huron westerly to Alcalde.

At the time of the passage of the said act of July 27, 1866, the tract of land last described was vacant and unappropriated public land of the United States, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions, or other claims or rights; and the said land has ever since so remained, excepting only as it has been affected by the laws of Congress and the acts of the parties in this amended bill mentioned and referred to.

Each of the tracts of land hereinbefore particularly described, is situated within the United States district of lands subject of sale and proceedings at Visalia, in the State of California.

X.

On July 13, 1891, your orator filed its Indemnity List No. 43, in the Land Office of the United States at Visalia,

describing the said south-half of the said southeast quarter of section 17, in township 24 south, range 17 east, Mount Diablo base and meridian, as selected by your orator in lieu of the said east half of the southwest quarter of section 19, in township 8 south, range 1 east, Mount Diablo base and meridian. The said list was in the form, and accompanied by the certificates, affidavits, and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and Commissioner of the General Land Office of the United States; and by the filing of the said list, accompanied as aforesaid, your orator did, on July 13, 1891, duly select, under the direction of the Secretary of the Interior, the said south half of the southeast quarter of section 17, in township 24 south, range 17 east, in virtue of the rights, aforesaid, granted to it by the said act of July 27, 1866. That on July 13, 1891, your orator had not, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the said act of Congress.

By and in virtue of the grant made by the said act of July 27, 1866, the provisions of the said act, and the matters and things hereinbefore set forth, on July 13, 1891, your orator became the owner of, and entitled to the issue from the United States to it of a patent for the south half of the southeast quarter of the said section 17, and thereafter the holder of the legal title to the said land, whoever it might be, held the same, in trust for your orator, and under the obligation to convey the same to it upon demand; and your orator at that time, and continuously thereafter until the commencement of this

suit, duly demanded the issuance of such patent from the United States to it. But notwithstanding such right, title, and demand, the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States each has, and all have, refused to issue a patent, conveying the said land to your orator.

XI.

Notwithstanding the premises, the United States, on or about April 11, 1890, in disregard of the rights in respect of said land theretofore acquired by your orator, executed and delivered its patent, conveying the legal title to said land to the said defendant Otto Groeck; and thereafter, and on or about April 11, 1891, the said Otto Groeck executed a deed, bearing that date, conveying the same to the defendant C. S. Merrill, Jr.; and the defendants claim, and each of them claims, that the said patent, so issued by the United States, conveyed the said land in fee simple to the defendant Otto Groeck, free from any trust in favor of your orator, and that the said deed from the said Otto Groeck to the said C. S. Merrill, Jr., conveyed the said land in fee simple to the said C. S. Merrill, Jr., free from any trust in favor of your orator. But, as your orator is informed and believes, such claims are made by the said defendants upon the following grounds and allegations, and none others, that is to say: That on or about September 17, 1885, the said defendant Groeck filed in the United States Land Office at Visalia his pre-emption declaratory statement for the said land, alleging therein that he settled on said land September 2, 1885, as a pre-emptor, and that on June 7, 1886,

the said Groeck was permitted to, and did, make proof, in the United States Land Office at Visalia that he was a qualified pre-emptor at the time he settled upon the said lands, that he settled thereon September 2, 1885, and improved the land and resided on it continuously from the time of his settlement to the date of the proof, and that on the day when said proof was made he was permitted to make pre-emption, entry, and payment for the said land, and that such proceedings were thereafter had in the Visalia Land Office and in the General Land Office and in the Department of the Interior of the United States as resulted in the issue of the patent to said Groeck above set forth.

But your orator alleges that, even if such allegations so made on behalf of the defendants should be found to be in any respect correct and true, the same did not in anywise authorize or justify the issue of said patent to said Groeck; that if the said Groeck did, in fact, settle upon said land as alleged, or file any pre-emption declaratory statement for the said land, or make any such proofs as alleged, or was permitted to or did, make pre-emption, entry, or payment for the said land, the fact is, that at all such times said land, and the whole thereof, was withdrawn from sale or location, pre-emption or homestead entry, under and by virtue of the order of March 22, 1867, hereinbefore referred to, and subsequent orders confirming or reinstating the same; and that said land has not, at any time since the third day of January, 1867, or, in any event, since the twenty-eighth day of June, 1870, been in anywise liable to sale, entry, or pre-emption; but sale, entry, and pre-emption thereof has been

expressly prohibited by law, which facts were well known to the said Groeck at and at all times since the date of any settlement, or alleged settlement, by him upon the said lands, and by the said Merrill at and prior to the time of the conveyance of said land to him by the said Groeck, and the said Groeck and Merrill acquired the title to said land only in trust for your orator, and subject to the obligation to convey to it on demand.

XII.

After the said patent issued from the United States, and prior to the said pretended conveyance by Otto Groeck to C. S. Merrill, Jr., your orator requested the defendant Otto Groeck to convey the title which he had received to the said land to it; and thereafter, and prior to the commencement of this suit, requested each of the defendants to convey such title to it; but each of the defendants has, at all times, refused so to do.

XIII.

Your orator further says, that it is the true owner of the title to the south half of the southeast quarter of section 17, in township 24 south, range 17 east, Mount Diablo base and meridian; and that the aforesaid patent conveying the same to the defendant Otto Groeck was wrongfully issued, without authority of law, in disregard of your orator's rights in the premises. That the said patent conveyed the legal title to the said land to the defendant Otto Groeck, but in trust, however, for your orator—of which the defendant C. S. Merrill, Jr., had full knowledge at the time he received said deed pretending to convey title to said land to him; and that the defend-

ants should convey to your orator the title so held by them, in and to the said land, free of encumbrances.

That your orator is remediless in the premises, at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable.

To the end, therefore, that the said Otto Groeck and C. S. Merrill, Jr., and each of them, may full and perfect answer make to all and singular the facts and matters herein set forth (but not upon oath or affirmation, the benefit of which is waived by your orator); and that it may be declared that your orator is the rightful owner of the said land, and that the defendants hold the legal title thereto in trust for your orator; and that it be decreed that the defendants convey such legal title, free of all encumbrances made, done, or suffered by them or either of them, to your orator, and that your orator may have such further or other relief as the nature of this case may require, and to your Honors shall seem meet:

May it please your Honors to grant unto your orator a writ of subpoena, to be directed to the said Otto Groeck and C. S. Merrill, Jr., the defendants herein, thereby commanding them and each of them, at a certain time, and under a certain penalty therein to be limited, to personally appear before your Honors, and then and there full, true, direct and perfect answer make to all and singular the premises; and to stand to, perform, and abide such further order, direction and decree therein as

to your Honors shall seem agreeable to equity and good conscience.

WM. SINGER, Jr.
Attorney for the plaintiff.

WM. F. HERRIN,
Counsel for the plaintiff.

**Exhibit "A."**

Department of the Interior,
General Land Office,
March 22, 1867.

Register and Receiver,
Visalia, Cal.

Gentlemen:

The Secretary of the Interior has transmitted to this office a map of the designated line of route of the Southern Pacific Railroad of California, and directed the withdrawal of the lands granted thereto under the act of 27 July, 1866—pamphlet laws 1866, page 299. The grant to this road is found in the eighteenth section of the above act; by that section this company is granted every *alternate* or *odd*-numbered section of public land for 10 *sections* in width on each side of the line of route and indemnity for lands, sold, reserved, or otherwise appropriated, within the grant from the alternate odd sections of unappropriated public land not "more than *10 miles* beyond the limits of the granted sections." The limits of the *grant* then are *20* miles on each side of the road and of the *indemnity 30* miles on each side.

In compliance with the Secretary's instructions I herewith enclose a diagram map having noted thereon that

part of the line of route within the *20* and *30*-mile limits which fall within the limits of your district, and you are hereby directed to withdraw from sale or location pre-emption or homestead entry *all the* odd sections within said limits, and no entries will be allowed thereon after the receipt of this order *except where bona fide pre-emption claims have attached prior to that time.* The even sections within the twenty limits will, by virtue of the act of March 3, 1853, be increased to two dollars and fifty cents per acre and subject to the provisions of the pre-emption and homestead laws at *that price except where pre-emption rights may have attached prior to this withdrawal;* in such cases then parties may prove up and pay for their claims *at the price they were held on the date of settlement.* The even sections within the twenty miles *will not* be subject to private entry until duly offered at the increased price.

By the sixth section of the act, the provisions of which are extended to the South Pacific road by the 18th section, the unsurveyed lands within forty miles on each side of the line of route are directed to be surveyed and the odd sections of land *granted* by the act "shall not be liable to sale or entry" or pre-emption *before or after they are surveyed,* "except by said company as provided in this act"; therefore, as plats of surveys *within the limits of the grants* may be filed in your office, you will immediately withdraw the *odd*-sections from pre-emption or entry of any kind and hold the same for the benefit of the road.

This order will take effect from the date of its recep-

tion and you will please to acknowledge the date of its receipt by you.

Respectfully,
Your obdt. Svt.,
JOS. S. WILSON,
Commissioner.

Also the Reg. & Rec. at Stockton, Cal., and San Francisco, Cal.

**Exhibit "B."**

Department of the Interior,
Washington, D. C., July 26, 1870.

Sir:

Referring to my letter of the fifteenth of December last, directing you to suspend, until further advised by this Department, all action under my decision of November 2, and 11, 1869, ordering the restoration of lands withdrawn on account of the Southern Pacific Railroad Company of California, I have now to inform you that by a joint resolution of Congress, approved June 28, 1870, the said company are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, and will, upon constructing their road and telegraph line on that route, in compliance with the provisions of the act of July 27, 1866, be entitled to patents for the granted lands.

You will advise the proper local officers of this legislation, that the reservation of 1867, on account of the company, may be respected.

Very respectfully, your obedient servant,

J. D. COX,
Secretary.

Hon. J. S. WILSON,
Commissioner of the General Land Office.

**Exhibit "C."**

Department of the Interior,
General Land Office,
July 29, 1870.

Register and Receiver,
San Francisco, Cal.

Gentlemen:

The Secretary of the Interior having informed this office that by a joint resolution (copy herewith enclosed) of Congress, approved June 28, 1870, the Southern Pacific Railroad Company of California are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, a copy of which was sent you on the twenty-second of March, 1867, I have to direct that the reservation as indicated in that letter be respected.

Please acknowledge receipt.

Yours respectfully &c.,
JOS. S. WILSON,
Commissioner.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Company vs. Otto Groeck and C. S. Merrill, Jr. Amended bill of complaint.

Filed July 6, 1896. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2 Union Trust Building, San Francisco, Cal., attorney for plaintiff.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Respondents.

**Plea of Respondents to Amended Bill of Complaint.**

The above named respondents, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do jointly and severally plead thereto, and for plea say:

The respondents allege that on or about the fifteenth day of August, 1897, the Secretary of the Interior made and entered in his records an order revoking and annulling all orders previously made reserving lands within the indemnity limit of all and every grant made to the Southern Pacific Railroad Company, and restoring them to the public domain, except so far as had theretofore been lawfully selected by said Southern Pacific Railroad Company, that from the date of said act of Congress of July 27, 1866, down to July 13, 1891, the Southern Pacific Railroad Company did not select or apply to select the land involved in this suit as indemnity land under the direction of the Secretary of the Interior, or otherwise.

Respondents further allege, that on the second day of September, 1885, respondent Groeck settled upon said land, and on the seventh day of September, 1885, filed his pre-emption declaratory statement for said land in the United States Land Office, in the Visalia Land District, being the district in which the said land is situated, and thereafter applied to the Register and Receiver of said United States Land Office to make final proof under said pre-emption law and the regulations of the Interior Department, and gave due notice as required by law and the said regulations that he would make such final proof on the seventh day of June, 1886; and on said seventh day of June, 1886, said Groeck was permitted to and did make proof in the United States Land Office at Visalia, that he was a qualified pre-emptor at the time he settled upon said land; that he settled thereon September 7, 1885, and improved the land and resided upon it continuously from the time of his settlement to the date of his proof; and at the time and place of making such proof complainant did not appear and assert any claim to, or interest in, said land; and on the day when said proof was made said respondent was permitted to and did make pre-emption entry and payment for said land, and then and there said respondent received from the Register and Receiver of said Land Office a final certificate for said land in due form of law, and thereafter, on or about April 11, 1890, a patent was duly and regularly issued by the United States to respondent Groeck for said land; that thereafter complainant, on July 13, 1891, applied to select said land, as alleged in its amended bill, by filing its List No. 43 in the United States Land Office

at Visalia, California; but said application was rejected and the selection of said land by complainant disallowed by the said Register and Receiver, and an appeal from their decision was dismissed by the order of the Commissioner of the General Land Office, and no appeal from the said order of dismissal has been taken by said complainant.

Respondents allege, that by reason of the facts hereinbefore set forth the issuance to the respondent Groeck of said patent for said land vested in said respondent Groeck a perfect and legal title in fee simple to said land; and, in any event, complainant, by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting any claim thereto.

All of which matters and things these respondents aver to be true and plead the same to the said bill, and pray the judgment of this honorable Court whether they or either of them ought to be compelled to make any further or any answer to the said bill.

W. B. WALLACE,
Solicitor for respondents.

J. H. CALL,
Of counsel.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

W. B. WALLACE,
Solicitor for respondent.

[Endorsed]: No. 347. In the United States Circuit Court, Southern District of California, Ninth Circuit.

Southern Pacific Railroad Company, complainant, vs. Otto Groeck & C. S. Merrill, Jr., Respondents. Plea of respondents to amended bill of complaint.

Service hereof admitted on behalf of complainant this fifteenth day of August, 1896, and verification waived.

WM. SINGER, JR.,
Attorney for complainant.

W. B. Wallace and J. H. Call, solicitors for respondents, Visalia, Cal.

Filed Aug. 19, 1896. Wm. M. Van Dyke, Clerk, by E. H. Owen, Deputy.

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At a stated term, to wit, the August term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the courtroom in the city of Los Angeles on Wednesday, the sixth day of January, in the year of our Lord one thousand eight hundred and ninety-seven. Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
OTTO GROECK et al., Defendants.
No. 347.

**Order Sustaining Plea to Amended Bill of Complaint.**

This cause having heretofore been submitted to the

Court for its consideration and decision upon defendant's plea to complainant's second amended bill of complaint, and the Court, having duly considered the same, and being fully advised in the premises, it is now, on this sixth day of January, 1897, being a day in the August term, A. D. 1896, of said Circuit Court of the United States for the Southern District of California, ordered that said plea be, and the same hereby is, sustained, with leave to the complainant, if it be so advised, to reply to the plea, and take issue in respect to the matters of fact therein alleged, within twenty (20) days from this date.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said Court January 6, 1897, in the cause entitled The Southern Pacific Railroad Company, complainant, vs. Otto Groeck et al., defendants, No. 347, and now remaining of record therein.

Attest my hand and the seal of said Circuit Court, this twenty-eighth day of June, A. D. 1897.

[Seal] WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck et al. Certified copy order.

Filed June 28, 1897. Wm. M. Van Dyke, Clerk.

*In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.*

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK, and C. S. MERRILL, Jr.,
Defendants.
No. 347.

**Record of Enrollment of June 28, 1897.**

The complainant filed its bill of complaint herein on the eleventh day of February, 1892, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon, on said eleventh day of February, 1892, issued, returnable on the seventh day of March, 1892, which is hereto annexed.

The defendants appeared herein on the seventh day of March, 1892, by W. B. Wallace, Esq., their solicitor.

On the twenty-fifth day of March, 1892, the demurrer of the defendants Otto Groeck and C. S. Merrill, Jr., to the bill of complaint, was filed herein, which is hereto annexed.

On the twenty-fourth day of July, 1893, the Court made and entered herein an order overruling defendants' demurrer, a copy of which order is hereto annexed.

On the ninth day of August, 1893, the Court made and entered herein an order allowing an amendment of the

bill, a copy of which order is hereto annexed; said bill of complaint was accordingly, on said ninth day of August, 1893, amended by the clerk.

On the fourteenth day of August, 1893, the Court made and entered herein an order vacating the order made and entered by this Court on the twenty-fourth day of July, 1893, overruling defendant's demurrer, a copy of which order is hereto annexed.

On the nineteenth day of August, 1893, the amended demurrer of the defendants, Otto Groeck and C. S. Merrill, Jr., to the bill of complaint was filed herein, which is hereto annexed.

On the twenty-eighth day of August, 1893, the Court made and entered herein an order overruling defendant's amended demurrer and that a decree be entered in favor of complainant, a copy of which order is hereto annexed.

On the fourth day of September, 1893, the Court made and entered herein an order revoking the order made and entered by this Court August 28, 1893, and setting demurrer for argument, a copy of which order is hereto annexed.

On the thirtieth day of April, 1894, the Court made and entered herein an order allowing the amendment of the complainant's bill of complaint, a copy of which order is hereto annexed, and on said day the bill of complaint was amended accordingly.

On the thirteenth day of May, 1895, the Court made and entered herein an order sustaining the amended demurrer of defendants', a copy of which order is hereto annexed.

The complainant filed its amended bill of complaint

herein on the thirty-first day of July, 1895, which is hereto annexed.

On the seventh day of October, 1895, the plea of respondents to the bill of complaint was filed herein and is hereto annexed.

On the eighteenth day of May, 1896, the Court made and entered herein an order sustaining the plea of defendants to the bill of complaint, a copy of which order is hereto annexed.

The complainant filed its amended bill of complaint herein on the sixth day of July, 1896, which is hereto annexed.

On the nineteenth day of August, 1896, the plea of respondents to the amended bill of complaint was filed herein, and is hereto annexed.

On the sixth day of January, 1897, the Court made and entered herein an order sustaining the plea of defendants to complainant's second amended bill of complaint, a copy of which order is hereto annexed.

On the twenty-eighth day of June, 1897, on motion of Joseph H. Call, Esq., of counsel for defendants, a final decree dismissing complainant's bill, with costs to defendants, was signed, filed, entered and recorded herein, and is hereto annexed.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.*

IN EQUITY.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK, and C. S. MERRILL, Jr.,
Defendants.
No. 347.

**Decree of June 28, 1897.**

This cause having heretofore been argued and submitted to the Court upon the plea of defendants to the second amended bill of complaint, and upon consideration thereof, the Court having, on the sixth day of January, 1897, being a day in the August term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, sustained said plea, with leave to the complainant, if it should be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty (20) days, and the complainant having failed and refused so to reply to said plea, and thereafter, in open Court, on this twenty-eighth day of June, 1897, being a day in the January term, A. D. 1897, of the said Circuit Court of the United States for the Southern District of California, the Court having ordered said bill of complaint dismissed.

Now, therefore, it is ordered, adjudged, and decreed that the said bill of complaint be and the same hereby is dismissed and that defendants have and recover of and from complainant, their, defendant's, costs, taxed at thirty-eight dollars and fifty cents, and that execution issue therefor after sixty days from date hereof.

Los Angeles, California, June 28, 1897.

ROSS,
Circuit Judge.

Decree entered and recorded June 28, 1897.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. The Southern Pacific Railroad Company, complainant, vs. Otto Groeck et al., defendants. Decree.

Filed June 28, 1897. Wm. M. Van Dyke, Clerk.

Whereupon said bill of complaint, subpoena, demurrer to bill of complaint, copy of order overruling defendant's demurrer, copy of order allowing amendment of bill of complaint, copy of order vacating order of July 24, 1893, amended demurrer to the bill of complaint, copy of order overruling amended demurrer, copy of order revoking order of August 28, 1893, and setting demurrer for argument, copy of order allowing amendment of complainant's bill of complaint, copy of order sustaining amended demurrer, amended bill of complaint, plea of respondents to the bill of complaint, copy of order sustaining plea of defendants' amended bill of complaint, plea of respondents to the amended bill, copy of order sustaining

plea of defendants to complainant's second amended bill of complaint and final decree, are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.,

[Seal] WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 347. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck et al. Enrolled Papers.

Filed June 28, 1897. Wm. M. Van Dyke, Clerk. Recorded Decree Register Book No. 2, page 171.

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## Mandate of United States Circuit Court of Appeals.

UNITED STATES OF AMERICA.—ss:

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of [Seal] the United States for the Southern District of California, Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of California, before you, or some of you, in a cause between The Southern Pacific Railroad Company, complainant, and Otto Groeck and C. S. Merrill, Jr., defendants, No. 347, a decree was duly filed and entered in said cause in said Circuit Court, which said decree is in the words and figures following, to wit:

"This cause having heretofore been argued and sub-

mitted to the Court upon the plea of defendants to the second amended bill of complaint, and, upon consideration thereof, the Court having, on the sixth day of January, 1897, being a day in the August term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, sustained said plea, with leave to the complainant, if it should be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty (20) days, and the complainant having failed and refused so to reply to said plea, and thereafter, in open Court, on this twenty-eighth day of June, 1897, being a day in the January term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, the Court having ordered said bill of complaint dismissed;

"Now, therefore, it is ordered, adjudged, and decreed that the said bill of complaint be, and the same hereby is, dismissed, and that defendants have and recover of and from complainant, their, defendants', costs, taxed at thirty-eight dollars and fifty cents, and that execution issue therefor after sixty days from date hereof.

"Los Angeles, California, June 28, 1897."

"ROSS,
"Circuit Judge."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals, for the Ninth Circuit, by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears,

And whereas, in the present term of October, in the

year of our Lord one thousand, eight hundred and ninety-eight, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

(May 2, 1889.)

You, therefore, are hereby commanded that such further proceedings be had in said cause, not inconsistent with the opinion of this Court, and as according to right and justice, and the laws of the United States, ought to be had, the said decree of said Circuit Court notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Costs of appellants:

| | |
|---|---|
| Trans. Cir. Ct. | $21.20 |
| Clerk C. C. A. | $23.25 |
| Printing Record, | $46.55 |
| Attorney | $20.00 |
| Taxed at | $111.00 |

F. D. MONCKTON,
Clerk.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 347. No. 398. United States Circuit Court of Appeals for the Ninth Circuit. October Term, 1897. *Southern Pacific R. R. Company vs. Otto Groeck et al.* Mandate.

Filed August 1, 1898. Wm. M. Van Dyke, Clerk.

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*In the United States Circuit Court, Southern District of California, Ninth Circuit.*

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK, and C. S. MERRILL, Jr.,
Defendants.

## Answer to Amended Bill of Complaint.

The answer of Otto Groeck and C. S. Merrill, Jr., to the bill of complaint, as amended by the Southern Pacific Railroad Company.

These defendants admit that the allegations and statements contained in paragraphs I, II, III, IV, VII, XII, of the amended bill of complaint are true.

Defendants admit that prior to January 3, 1867, the plaintiff fixed the general route of the entire line of its railroad authorized by the act of Congress of July 27, 1866, and on the third day of January, 1867, the plaintiff filed a map showing the general and preliminary route of its proposed line of railroad from the bay of San Fran-

cisco via Tehachapi Pass and Mojave to the Colorado river, at or near the town of Needles, California.

These defendants admit that such action was taken upon said map by the Secretary of the Interior, as is alleged in the bill of complaint, as amended.

Defendants admit the passage by Congress on June 28, 1870, of a joint resolution, as alleged.

These defendants admit and allege that the plaintiff filed in the General Land Office and Department of the Interior, plats showing portions of its line of railroad as definitely located and constructed, as alleged in paragraph VII of said amended bill of complaint, and at the times therein set forth.

These defendants admit and allege that said land in suit, to wit:

South one-half (½) of southeast quarter (¼) of section seventeen (17), township twenty-four (24) south, range seventeen (17) east, M. D. B. M., is part of an odd-numbered section, situated more than twenty miles, but within thirty miles of the said line of general route filed in the year 1867; and also of that portion of the line of said railroad as constructed and definitely located in the year 1889, extending from Huron to Alcal*da*.

And defendants admit that portions of said line of railroad were constructed by the plaintiff and accepted by the President of the United States, as alleged and at the times respectively set forth in said amended bill.

Defendants admit that on March 22, 1867, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, withdrew the odd-numbered sections of land with thirty miles of the line of general route

shown upon said map filed on January 3, 1867, from sale or location pre-emption or homestead entry, as alleged in said amended bill.

Defendants admit that the plaintiff applied to select the land in suit as indemnity and in lieu of other lands, at the time and in manner and form as alleged in said amended bill.

Defendants deny that the map filed by plaintiff in the year 1867 was a map of definite location or any map designating its line of railroad, or that it was anything other than a map of general route of plaintiff's proposed line of road.

Defendants deny that plaintiff filed any part of its map of definite location, or any part of its map designating its line of railroad, opposite or coterminous with the land in suit herein, prior to the year 1889.

Defendants deny that plaintiff ever filed any map designating the line of its route.

Defendants deny that plaintiff ever selected this land as indemnity or otherwise.

Defendants deny that any selection of said land by plaintiff was approved by the Secretary of the Interior.

Defendants deny that said land was ever selected by plaintiff under or by direction of the Secretary of the Interior.

Defendants deny that plaintiff is the owner of said land or of any interest therein, legal or equitable.

Defendants allege that prior to the commencement of this suit, and prior to any attempt of plaintiff to select said lands, and in the year 1885, said land then being public land of the United States, defendant Otto Groeck en-

tered and settled upon said land as a pre-emptor under the laws of the United States relating thereto.

Defendants allege that defendant Groeck was then a citizen of the United States, fully qualified to enter said land. That defendant paid all proper fees and resided upon said land as required by law, and performed all other acts to entitle him to said lands. That he made proof of his entry and settlement in compliance with all the requirements of the laws in the year 1890, a patent in due form of law was issued to him by the United States for said land.

Defendants admit and allege that said land was patented by the United States to the defendant Otto Groeck, conveying to him an absolute and perfect title in fee simple.

These defendants admit that the matter in dispute in this suit, to wit: the value of the land in controversy, exceeds, exclusive of interest and costs, the sum or value of two thousand ($2,000.00) dollars.

These defendants admit that on July 27, 1866, said land in controversy was vacant and unappropriated public land, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, and has since so remained, except as shown by this answer.

Wherefore, these defendants pray to be dismissed hence, with their reasonable costs and expenses.

OTTO GROECK and
C. S. MERRILL, Jr.,
By their solicitor and counsel,
W. B. WALLACE.

[Endorsed]: No. 347. In the United States Circuit Court, Southern District of California, Ninth Circuit. Southern Pacific Railroad Company, complainant, vs. Otto Groeck and C. S. Merrill, Jr., respondents. Answer.

Service hereof admitted on behalf of complainant this seventh day of July, 1898.

WM. SINGER, Jr.,
Attorney for Complainant.

Filed Aug. 1, 1898. Wm. M. Van Dyke, Clerk. W. B. Wallace, solicitor for respondents, Visalia, Cal.

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*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

IN EQUITY.

SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK, and C. S. MERRILL, Jr.,
Defendants.
No. 347.

## Replication.

Replication of the plaintiff, Southern Pacific Railroad Company, to the answer of the defendants, Otto Groeck and C. S. Merrill, Jr., defendants.

The plaintiff, saving and reserving to itself all and all manner of advantage of exception which may be had

and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendants, for replication thereunto, says: That the plaintiff does, and will ever, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and humbly, as in and by its said bill it has already prayed.

WM. SINGER, Jr.,
Attorney for the plaintiff.

WM. F. HERRIN,
Counsel for the plaintiff.

[Endorsed]:

Due service admitted as made in time.

W. B. WALLACE,
Attorney for the defendants.

No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Company vs. Otto Groeck and C. S. Merrill, Jr. Replication.

Filed Nov. 5, 1898. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2, Union Trust building, San Francisco, Cal., attorney for plaintiff.

*In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.*

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and C. S. MERRILL, Jr.
Defendants.
No. 347.

## Record of Enrollment of May 31, 1899.

On the twenty-fourth day of August, 1897, an appeal by complainant was taken from the foregoing final decree entered on the twenty-eighth day of June, 1897, to the United States Circuit Court of Appeals for the Ninth Circuit.

On the first day of August, 1898, the mandate of the United States Circuit Court of Appeals for the Ninth Circuit was filed and entered herein, and is hereto annexed.

On the first day of August, 1898, the answer of the defendants to complainant's bill of complaint was filed herein, and is hereto annexed.

On the fifth day of November, 1898, the Court made and entered an order herein directing the clerk to amend the bill of complaint and the bill of complaint was amended by the clerk pursuant to said order.

The replication of the complainant to the answer of the defendants was filed herein on the fifth day of November, 1898, and is hereto annexed.

On the third day of April, 1899, the Court made and entered an order herein that a decree be entered for complainant, the Southern Pacific Railroad Company, as prayed for in the bill of complaint.

On the thirty-first day of May, 1899, a final decree in favor of the complainant was accordingly signed, filed, entered and recorded herein, and is hereto annexed.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK, JENNY L. MERRILL and LEM HERIFORD, as Executors of the Estate of C. S. Merrill, Jr., Deceased,
Defendants.
No. 347.

**Decree of May 31, 1899.**

This cause was submitted on the complainant's second amended bill of complaint, the answer of the defendants Otto Groeck and C. S. Merrill, Jr., thereto, the complainant's replication to the said defendants' answer, an agreed statement of the facts made by the respective parties, and the briefs filed by counsel for the respective parties; and

thereafter the death of the defendant C. S. Merrill, Jr., since submission of the cause was suggested, and a stipulation was filed, signed by counsel for the complainant and counsel for the hereinafter mentioned executors, agreeing that Jenny L. Merrill and Lem Heriford are executors of the estate of the said C. S. Merrill, Jr., deceased, and that they may be substituted, by the order of this Court, as such executors, in the place and stead of the said C. S. Merrill, Jr., as parties defendants herein.

It is now ordered, adjudged, and decreed as follows:

First.—That Jenny L. Merrill and Lem Heriford, as executors of the estate of C. S. Merrill, Jr., be, and they are, substituted for and in the place and stead of the said C. S. Merrill, Jr., as parties defendants herein.

Second.—That the patent bearing date April 11, 1890, issued by the United States to the defendant Otto Groeck, conveyed unto the said Otto Groeck the legal title to the south one-half of the southeast one-quarter of section seventeen, in township twenty-four south, range seventeen east, Mount Diablo meridian, situated in Kern county, California, in trust for and under obligation to convey the same to the complainant Southern Pacific Railroad Company, of which the defendant C. S. Merrill, Jr., during his life, at all times had notice.

Third.—That on or about April 11, 1890, the defendant Otto Groeck made, executed and delivered a deed, purporting to grant an interest in the lands hereinbefore described to the defendant C. S. Merrill, Jr.; but all right, title, or interest conveyed by the said deed, or at any time held by the said C. S. Merrill, Jr., or now or at any time held by the defendants Jenny L. Merrill or Lem Her-

iford, executors as aforesaid, was and is so held under and in pursuance of the said patent issued by the United States to the defendant Otto Groeck, and was and is so held in trust for and under obligation to convey the same to the complainant Southern Pacific Railroad Company, free of incumbrances.

Fourth.—That the defendants Otto Groeck, Jenny L. Merrill and Lem Heriford, as executors of the estate of C. S. Merrill, Jr., deceased, each and all of them, make, execute, acknowledge, and deliver their deed granting and conveying unto the complainant Southern Pacific Railroad Company, the lands hereinbefore described within sixty days from the date hereof.

Fifth.—L. D. C. Gray is hereby appointed special Master in Chancery, and in case the defendants Otto Groeck, Jenny L. Merrill and Lem Heriford, executors as aforesaid, either or any of them, fail to make, execute, acknowledge and deliver the deed provided for by the fourth item of this decree, within the time therein specified, then the said L. D. C. Gray, as special Master in Chancery, is hereby authorized and directed to make, execute, acknowledge and deliver such deed, for and in behalf of the said defendants, either, any, or all of them; and the deed of the said Special Master in Chancery shall have the same force and effect as would the deed of the said defendants if made, executed, acknowledged, and delivered by them.

Sixth.—That the defendants pay the costs of this suit, taxed at $——; and the complainant have execution therefor.

Dated and signed on May 31, 1899.

ROSS,
Circuit Judge.

Decree entered and recorded May 31, 1899.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy.

[Endorsed: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Co. vs. Otto Groeck et al. Decree. Filed May 31, 1899. Wm. M. Van Dyke, Clerk, Chas. N. Williams, Deputy. Wm. Singer, Jr., rooms 61-62, Union Trust building, San Francisco, Cal., attorney for Southern Pacific Railroad Company.

Whereupon, said mandate of the United States Circuit Court of Appeals for the Ninth Circuit, answer, replication and said final decree are hereto annexed, said final decree being duly signed, filed and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc.,

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy.

[Endorsed]: No. 347. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck et al. Enrolled papers.

Filed May 31, 1899. Wm. M. Van Dyke, Clerk, by Chas. N. Williams. Deputy Clerk. Recorded decree register Book No. 2, page 383.

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*In the Circuit Court of the United States, for the Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY
vs.
OTTO GROECK et al.

**Opinion on Plea to Second Amended Bill of Complaint.**

To the second amended bill of complaint, filed herein July 6, 1896, the defendants interposed a plea, which the complainant caused to be set down for argument, and which was, by the respective parties, submitted upon the same briefs theretofore filed upon the hearing of the plea to the first amended bill.

For the purpose of disposing of the plea so submitted, the Court must assume, without proof on either side, the facts to be as set out in the amended bill, where not controverted by the plea, and where so controverted or inconsistent to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. (Southern Pacific Railroad Company vs. Groeck et al., 74 Fed. Rep. 585, and cases there cited.)

The case as now presented is substantially the same as when last under consideration. For the reasons given

in the opinion then filed, and which is reported in 74 Fed. Rep. 585, an order will be entered sustaining the plea, with leave to the complainant, if it be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty days from this date.

ROSS,
Circuit Judge.

[Endorsed]: 347. United States Circuit Court, Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck et al. Opinion on Plea to Second amended bill.

Filed Jan. 6, 1897. Wm. M. Van Dyke, Clerk.

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*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK et al.,
Defendants.

## Opinion on Final Submission.

In its different stages this case has been three times under the consideration of this Court, and once by the Circuit Court of Appeals for this circuit: 68 Fed. Rep. 609; 74 Fed. Rep. 585, opinion filed January 6, 1897, not re-

ported; 87 Fed. Rep. 970. It was presented to this Court on demurrer to the original bill; next upon a plea filed by the defendants to the amended bill, which the complainant caused to be set down for argument, anl which was thereafter argued, submitted, and disposed of by the opinion reported in 74 Fed. Rep. 585; and then upon a plea interposed by the defendants to the second amended bill, which the complainant likewise caused to be set down for argument, and which was thereafter argued and submitted, resulting, for the reasons given in the former opinion, in an order sustaining the plea, with leave to the complainant, if it should be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged. A replication was thereafter filed by the complainant, and an agreed statement of facts entered into by respective parties, upon which, together with the second amended bill of complaint and the answer thereto, the case is now submitted for final decision.

The subject in controversy is a piece of land which was settled upon by the defendant Groeck on the second day of September, 1885, as government land, and which he was, against the protest and after a contest by the complainant, permitted by the land department to enter as such, and for which a patent was issued to him by the government of the United States on the eleventh day of April, 1890. The complainant, claiming to be entitled to the land by virtue of a congressional grant, seeks by the suit to obtain a decree that the title conveyed by the patent to Groeck is held in trust for it, to compel the conveyance thereof to the complainant, and

to enjoin the defendants from asserting any title thereunder.

The grant under which the complainant claims the land is that of July 27, 1866 (14 Stat. 292), by which, among other things, the Southern Pacific Railroad Company was authorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the State of California, as it should deem most suitable for a railroad line to San Francisco, and subject to certain conditions, exceptions, and limitations, was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time such road should be designated by a plat thereof filed in the office of the commissioner of the General Land Office; and where, prior to said time, any of said sections, or parts of sections, should be granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including reserved numbers." The original bill alleged, among other things, that on the twenty-fourth day of November, 1866, the complainant, by its board of directors, accepted the grant upon the terms and conditions contained in it, which acceptance was filed with the Secretary of

the Interior December 27, 1866, and that on the third day of January, 1867, complainant filed with the secretary a map of the route of its road as located and surveyed, which map was accepted by the secretary, and on the same day transmitted by him to the Commissioner of the General Land Office to be filed in that office, which was done on that day; that on the twenty-second day of March, 1867, the commissioner transmitted a copy of the map to the register and receiver of the local land office at Visalia, California, in which district the land in controversy is situated, and that the register of the local land office acknowledged its receipt by letter of date March 30, 1867. The original bill also set forth the joint resolution of Congress of June 28, 1870 (16 Stats. 382), by which complainant was authorized to "construct its road and telegraph lines, as near as may be, on the route indicated upon the map filed by said company in the Department of the Interior on the third day of January, 1867," and alleged that the road was completed by the complainant upon the line as shown upon that map, and as constructed ran through Tulare county, which is within the district of lands subject to sale at Visalia, California, and was completed within the time limited by the acts of Congress, which fact was duly reported to the President and by him accepted and approved; that the land in controversy is more than twenty, but within thirty miles of the complainant's road as so located and constructed, and that when its route was definitely fixed the said land had not been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed or, or appropriated by the United States for any

purpose, but that the United States then had full title thereto; that the entire indemnity limits along the grant to the complainant are insufficient to supply the losses sustained by it within the granted limits, and that the Commissioner of the General Land Office, in his annual report to the President and to the Interior Department for the year 1883 "has attested and certified to the fact that the land within the indemnity limits of said act of July 27, 1866, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act." The original bill further alleged that on the thirteenth of July, 1891, complainants selected the land in controversy in its indemnity list No. 43, at the land office in Visalia, which office refused to approve the selection, although complainant offered all the fees for the purpose of listing, selecting, and securing a patent of the land, and that a like refusal has been made by the Commissioner of the General Land Office and by the Secretary of the Interior.

Similar allegations were made in both the amended and second amended bills.

This Court held, in the opinions referred to, that upon the filing by the complainant in the General Land Office of its map of the general route of the road authorized to be built, the granting act itself operated to withdraw the lands within the indemnity, as well as the primary, limits of the grant from sale or other disposition, for the benefit of the grantee, and that the piece of land in controversy being within the indemnity limits of the grant to complainant was not subject to settlement by Groeck, and that, therefore, the action of the officers of the land de-

partment awarding and patenting the land to him was erroneous. That ruling of this Court was sustained by the Circuit Court of Appeals in the opinion reported in 87 Fed. Rep. 970. And, as it then appeared that the complainant had completed the road so authorized to be built, and had filed in the General Land Office maps showing its definite location, judgment would, therefore, have followed for the complainant as prayed for, but for the fact that the complainant, having waited nearly twenty-five years after the withdrawal of the land in controversy for its benefit, and more than five years after the defendant Groeck's adverse entry upon it, before attempting to select the land in controversy and having waited for more than another year before instituting suit therefor —the entire delay and neglect being its own, and in no respect caused by any failure or neglect on the part of the Government, or of any of its officers—it was here held that the complainant was guilty of such laches as made it proper for a Court of equity to refuse its aid; this Court being of opinion that, notwithstanding Groeck's settlement was without right, and notwithstanding the proceedings in the land office awarding and patenting the land to him were erroneous, that there must always be on the side of a complainant invoking the aid of the equity powers of a Court of justice, not only conscience and good faith, but reasonable diligence as well. In this latter view the Circuit Court of Appeals held that this Court was in error, and accordingly reversed its decree, with directions for further proceedings not inconsistent with its opinion.

If, therefore, the facts, as now presented, be in substance the same as those considered on the former hearings of the cause, there will be nothing left for this Court to do but to give judgment for the complainant.

On the previous presentation of the cause it appeared that, while the map filed by the complainant in the General Land Office on the third day of January, 1867, was a map of the general route of the road authorized to be built, and while it appeared that it actually constructed the road in sections prior to the filing of any map of its definite location, it also appeared that such map of definite location was filed in the General Land Office in sections subsequent to the completion of the road. Thus, in the opinion of the Circuit Court of Appeals, 87 Fed. Rep. 971, that Court, in stating the facts, said: "The appellant (Southern Pacific Railroad Company) commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889—the last section extending from Huron westerly to Alcalde, saving been constructed during the year 1888."

And in the opinion of this Court on demurrer to the original bill, reported in 68 Fed. Rep. 609, 611, it is said: "The bill also sets forth the joint resolution of Congress of June 28, 1870 (16 Stat. 382), by which complainant was authorized to 'construct its road and telegraph lines, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, 1867,' and alleges that the road was built by the complainant upon the line as shown upon that map, and, as constructed, ran through Tulare county,

which is within the district of lands subject to sale at Visalia, Cal., and was completed within the time limited by the acts of Congress, which fact was duly reported to the President, and by him accepted and approved; that the land in controversy is more than twenty, but within thirty, miles of the complainant's road as so located and constructed, and that when its route was definitely fixed the said land had not been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of or appropriated by the United States for any purpose, but that the United States then had full title thereto; that the entire indemnity limits under the grant to the complainant are insufficient to supply the losses sustained by it within the granted limits, and that the Commissioner of the General Land Office, in his annual report to the President and to the Interior Department for the year 1883, 'has attested and certified to the fact that the land within the indemnity limits in said act of July 27, 1866, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act.'"

The agreed statement of facts upon which the case in now submitted shows, among other things, that on January 3, 1867, the complainant filed a map of the general route of the entire railroad which it was by the act of July 27, 1866, and the joint resolution of Congress of June 28, 1870, authorized to construct, in the office of the Commissioner of the General Land Office, and that on that day the Secretary of the Interior and the commissioner duly accepted and approved the said map, and the general route shown thereon; that the complainant commenced

to build its railroad during the year 1870, and completed the construction of that portion thereof extending from San Francisco to Tres Pinos, and from Alcalde to Needles by way of Goshen and Mojave, in several different sections prior to the year 1889; the last section thereof, extending from Huron westerly to Alcalde, being constructed during the year 1888, and that all of such railroad was constructed along the line shown on the general route map of January 3, 1867; that the complainant filed maps in several sections of the definite location of said railroad (except that portion between Alcalde and Tres Pinos), along the line shown on the said general route map, being the same line upon which it was constructed, and that the said maps of definite location were accepted and approved by the Secretary of the Interior on the following dates, to wit: Of the first section thereof, on August 7, 1871; of the second section thereof, October 26, 1871; of the several sections of the road extending from Huron to Mojave, at various dates between January, 1878, and December 31, 1884; and of the section of the road extending from Huron westerly to Alcalde, on April 2, 1889; that as each of the said sections were constructed, they were examined, respectively, by commissioners appointed by the President of the United States for that purpose, who duly reported to the President that each of the sections had been completed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress, and that the President duly accepted and approved all of those reports; that all of the said reports were so made, accepted, and approved between August 7, 1871, and November 8, 1889, inclusive, the latest being the report upon

the section of road extending from Huron to Alcalde, which was accepted and approved, as aforesaid, on November 8, 1889. It further appears from the agreed statement that the piece of land in controversy is situated opposite to and coterminous with this latter section of the complainant's road, and is within thirty miles thereof.

I am of opinion that the joint resolution passed by Congress on June 28, 1870 (16 Stat. 382), distinguishes this case from those relied upon by the counsel for the defendants; for that resolution declared that the Southern Pacific Company might construct its road and telegraph line, as near as might be, on the route indicated by the map filed by it in the Interior Department on the third day of January, 1867, and that "upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual

settlers, together with the other conditions and restrictions provided for in the third section of said act." Congress itself thus provided for the building of the complainant's road along the line designated by the map filed by it in the General Land Office on the third day of January, 1867; and the complainant having so built all of its road along that line, except the portion between Tres Pinos and Alcalde, has earned the public lands situated opposite to and coterminous with the portions so completed within the place limits of the grant, and the right to select within its indemnity limits such of the public lands as are necessary to make goods the losses sustained by it within the primary limits of the grant.

The complainant's failure to build that portion of the road between Tres Pinos and Alcalde is a matter for the consideration of Congress.

There will be a decree for the complainant.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Company vs. Otto Groeck et al. Opinion of the Court.

Filed April 3, 1899. Wm. M. Van Dyke, Clerk.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Defendants.
No. 347.

**Stipulation to Correct Amended Complaint.**

It is agreed that the word "filed" at the end of the first line of subdivision "V" of the plaintiff's amended complaint filed on July 6, 1896, is mis-written for the word "fixed"; and the clerk of the above mentioned Court is requested to strike out the said word "filed" and insert the word "fixed" instead thereof.

WM. SINGER, Jr.,
Attorney for the plaintiff.
W. B. WALLACE,
Attorney for the defendants.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Company vs. Otto Groeck and C. S. Merrill, Jr. Stipulation.

Filed Nov. 5, 1898. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61, 62, Union Trust building, San Francisco, Cal.

At a stated term, to wit, the August term, A. D. 1898, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the courtroom in the city of Los Angeles, on Saturday, the fifth day of November, in the year of our Lord, one thousand eight hundred and ninety-eight. Present: The Honorable OLIN WELLBORN, District Judge.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Defendants,
No. 347.

**Order to Correct Amended Bill of Complaint.**

Pursuant to the stipulation of the parties, it being agreed that the word "filed" at the end of the first line of subdivision "V" of the plaintiff's amended complaint, filed on July 6, 1896, is mis-written for the word "fixed," the clerk of this Court is authorized and directed to strike out the said word "filed" and insert the word "fixed" instead thereof.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

IN EQUITY.

SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Defendants.
No. 347.

## Agreed Statement of the Facts.

It is stipulated by the plaintiff and the defendants, that this cause may be submitted to the Court for its opinion and decree upon the plaintiff's amended complaint filed on July 6, 1896, the defendants' answer thereto, the plaintiff's replication, and this agreed statement of the facts; and it is mutually agreed that:

First Item.—The plaintiff is a duly organized corporation of, and a citizen of, the State of California; and each of the defendants is a citizen of the same State, and an inhabitant of the Southern District thereof.

Second Item.—The matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of five thousand dollars, and arises under the laws of the United States.

Third Item.—The congressional act of July 27, 1866, and joint resolution of June 28, 1870, referred to in the

plaintiff's amended complaint, authorized the plaintiff to construct a railroad from San Francisco by way of Mojave to Needles, on the Colorado river; and to aid in the construction thereof made the plaintiff a land-grant, as is therein provided and fully appears.

Fourth Item.—On December 27, 1866, the plaintiff duly accepted the land-grant, terms and conditions of the said act, and filed such acceptance in the office of the Secretary of the Interior; which acceptance was in writing, under plaintiff's corporate seal, and was duly executed pursuant to the directions of its board of directors, theretofore made.

Fifth Item.—On January 3, 1867, the plaintiff filed a map of the general route of the entire railroad it was authorized by the said acts of Congress to construct, in the office of the Commissioner of the General Land Office; and on that day the Secretary of the Interior and the said commissioner duly accepted and approved the said map, and the general route shown thereon. This is the map referred to, and intended to be pleaded in subdivision V of the plaintiff's amended complaint.

Sixth Item.—On March 22, 1867, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew the odd sections of land lying within thirty miles of the line of route shown on the said general route map, from sale or location, preemption or homestead entry. On November 2, 1869, the then Secretary of the Interior made an order declaring the withdrawal of March 22, 1867, revoked; on December 15, 1869, the same Secretary of the Interior suspended his order of November 2, 1869; on June 28, 1870, the

joint resolution referred to in subdivision V of the plaintiff's said amended complaint was passed; on July 26, 1870, the Secretary of the Interior restored the withdrawal of March 22, 1867; and on August 15, 1887, the then Secretary of the Interior declared the withdrawal of March 22, 1867, revoked as to the lands distant more than twenty miles from the line of road shown on the said general route map, and not therefore selected by the plaintiff.

Seventh Item.—The plaintiff commenced to build its railroad during the year 1870, and completed the construction of that portion thereof extending from San Francisco to Tres Pinos, and from Alcalde to Needles by way of Goshen and Mojave, in several different sections, prior to the year 1889; the last section thereof, extending from Huron westerly to Alcalde, was constructed during the year 1888; and all of the railroad mentioned in this paragraph was constructed along the line shown on the general route map of January 3, 1867.

Eighth Item.—The plaintiff filed maps, in several sections of the definite location of the said railroad (except that portion between Alcalde and Tres Pinos) along the line shown on the said general route map, being the same line upon which it was constructed; and the said maps were accepted and approved by the Secretary of the Interior on the following dates: Of the first section thereof, on August 7, 1871; of the second section thereof, on October 26, 1871; of the several sections of the road extending from Huron to Mojave, at various dates between January, 1878, and December 31, 1884; and of the section

of the road extending from Huron westerly to Alcalde, on April 2, 1889.

Ninth Item.—As the plaintiff's railroad was constructed, in the several sections aforesaid, such sections were examined, respectively, by commissioners appointed by the President of the United States for that purpose; who duly reported to the President that each of the sections had been constructed and completed in a good, substantial and workmanlike manner, in all respects as required by the said act of Congress; and the President duly accepted and approved all of those reports. All of the said reports were so made, accepted and approved at different dates between August 7, 1871, and November 8, 1889, inclusive; the latest of those reports being the report upon the section of road extending from Huron to Alcalde, which was accepted and approved as aforesaid on November 8, 1889.

Tenth Item.—The east one-half of southwest one-quarter of section 19, in township 8 south, range 1 east, Mount Diablo meridian, containing eighty acres, is a tract of land within the primary limits of the plaintiff's said land-grant, in lieu of which it was at all times entitled to select eighty acres of land within the indemnity limits of that grant.

Eleventh Item.—The south one-half of southeast one-quarter of section 17, in township 24 south, range 17 east, Mount Diablo meridian, contains eighty acres, is situated in Kings county, and within the Visalia land district of the United States. The said land is distant more than twenty miles from, but lies within thirty miles of, the line of road shown on the general route map filed by

plaintiff on January 3, 1867, and is distant more than twenty miles from but lies within thirty miles of the plaintiff's railroad as definitely located and constructed, and shown on the maps of definite location and construction thereof. The said land is opposite to and coterminous with the section of railroad extending from Huron westerly to Alcalde, and unless excepted therefrom by the pre-emption settlement, filing, entry and patent of the defendant, hereinafter set forth, it at all times comprised a part and portion of the indemnity limits lands described in the grant made plaintiff by the aforesaid acts of Congress, from which indemnity selections were authorized, and was at no time covered by any other exception thereto.

Twelfth Item.—On September 2, 1885, the defendant Otto Groeck settled upon the land described in the eleventh item hereof, and on September 7, 1885, filed his pre-emption declaratory statement for the said land in the United States Land Office at Visalia, and thereafter applied to the register and receiver of that land office to make final proof under the pre-emption laws of the United States and the regulations of the Interior Department, and gave due notice as required by law and the said regulations that he would make such final proof on June 7, 1886; and on June 7, 1886, he was permitted to, and did, make proof in the said land office, that he was a qualified pre-emptor at the time he settled upon said land; that he settled thereon September 2, 1885, and improved the land and resided upon it continuously from the time of his settlement to the date of his proof; and at the time and place of making such proof the

plaintiff did not appear nor assert any claim to nor interest in, the said land; and on the day when said proof was made the defendant Groeck was permitted to, and did, make pre-emption entry and payment for the said land, and received from the register and receiver of the said land office a final certificate of such payment and entry in due form of law; and on April 11, 1890, a patent, in due form of law, was issued by the United States to the defendant Groeck, conveying the said land to him, in pursuance of his pre-emption entry thereof.

Thirteenth Item.—On July 13, 1891, the plaintiff filed its List No. 43, in the said Visalia land office, selecting the land described in the eleventh item hereof in lieu of the land described in the tenth item hereof, as indmnity land granted to it (plaintiff) by the said act of Congress; which selection was in the form, and accompanied by the certificates, affidavits, costs and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and the Commissioner of the General Land Office. The said list was on that day (July 13, 1891) rejected by the Register and Receiver of the said Visalia land office, solely because of the pre-emption settlement, filing, entry and patent of the defendant Groeck, as they are set forth in the twelfth item hereof. The plaintiff appealed from the said rejection, and its appeal was dismissed by the Commissioner of the General Land Office; but the plaintiff did not appeal from the Commissioner's dismissal. It is admitted that the selection set forth in this thirteenth item is the only selection which the plaintiff made, or applied to make, of the said land; and that but for the pre-emption settlement, filing, entry and pa-

tent of the defendant Groeck, as set forth in the twelfth item hereof, the said selection should have been approved and patented.

Fourteenth Item.—On November 7, 1879, the Secretary of the Interior approved and issued a general circular of instructions relating to the adjustment of railroad land-grants prescribing the form and procedure for the selection by railroad companies of lands within the primary and indemnity limits, of land-grants made by Congress to such companies; which circular has, ever since its date, remained in force and operation as to the following, among other directions therein made by the then Secretary of the Interior, relating to the Lists required to be filed by railroad companies in selecting lands within the primary and indemnity limits of their land-grants from Congress, to wit: "The Lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and tested, and found correct in all respects, they will become final locations, and you will, on the payment of the requisite fees to the receiver, so certify at the foot of the list according to form 'B.'"

Fifteenth Item.—On or about April 11, 1891, the defendant Groeck executed and delivered a deed, purporting to grant an interest in the title conveyed to him (Groeck) by the said patent, to the defendant C. S. Merrill, Jr.; and both defendants refused, upon demand before suit, to convey the land of the said patent, or their right, title or interest in the same, to the plaintiff.

Sixteenth Item.—All the facts herein set forth were at all times known to each of the defendants.

Seventeenth Item.—All allegations of fact in the plaintiff's said amended complaint, not inconsistent with the facts herein agreed to, nor denied in the defendant's answer, are admitted to be true.

Dated and signed on October 14, 1898.

WM. SINGER, Jr.
Attorney for the plaintiff.
W. B. WALLACE,
Attorney for the defendants.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Co. vs. Otto Groeck and C. S. Merrill, Jr. Agreed Statement.

Filed Dec. 3, 1898. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2 Union Trust building, San Francisco, Cal., attorney for ————.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

IN EQUITY.

SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff,
vs.
OTTO GROECK, and C. S. MERRILL, Jr.,
Defendants.
No. 347.

**Stipulation for Submission of Cause.**

It is stipulated that this case may be submitted for decision on the plaintiff's amended complaint filed on July 6, 1896, the defendant's answer thereto, the plaintiff's replication, the agreed statement of facts filed herein, and the briefs of the respective parties heretofore filed in the cause with this Court and with the Circuit Court of Appeals, and the defendants' brief filed herewith.

WM. SINGER, Jr.,
Attorney for plaintiff.

W. B. WALLACE,
Attorney for defendants.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Co. vs. Otto Groeck and C. S. Merrill, Jr. Stipulation.

Filed Dec. 3, 1898. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61, 62 Union Trust building, San Francisco, Cal.

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At a stated term, to wit, the August term, A. D. 1898, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the courtroom in the city of Los Angeles, on Monday, the fifth day of December, in the year of our Lord one thousand and eight hundred and ninety-eight. Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Defendants,
} No. 347.

## Order of Submission.

Pursuant to the stipulation of the parties to said cause by their attorneys which has been filed herein, it is ordered that this case be and hereby is submitted for decision on the plaintiff's amended complaint filed on July 6, 1896, the defendants' answer thereto, the plaintiff's replication, the agreed statement of facts filed herein, and the briefs of the respective parties heretofore filed in

this cause with this Court and with the Circuit Court of Appeals, and the defendants' brief filed with said stipulation.

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*In the United States Circuit Court, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merrill, Deceased,
Defendants.
No. 347.

**Petition for and Order Allowing Appeal.**

To the Judges of the United States Circuit Court, Ninth Circuit, Southern District of California:

The above-named defendants, conceiving themselves aggrieved by the decree made and entered herein on the thirty-first day of May, A. D. 1899, appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and file herewith their assignment of errors asserted and intended to be urged upon appeal, and they pray that their appeal may be allowed.

Dated this second day of June, 1899.

JOSEPH H. CALL,
Attorney and counsel for said defendants.

The foregoing petition for appeal is hereby allowed and granted, and it is further ordered that a transcript of the record shall be made under the hand and seal of the clerk of this Court, and transmitted to the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California.

Dated this fifth day of June, A. D. 1899.

ROSS,
Circuit Judge.

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*In the United States, Circuit Court, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK et al.,
Defendants.
No. 347.

## Assignment of Errors.

The defendants in the above-entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors, as to which matters and things they say that the decree entered herein on the thirty-first day of May, 1899, is erroneous, to wit:

First.—The tract of land in suit in this cause being situated outside of the granted limits of the grant of complainant, and within the indemnity limits of complain-

ant's grant, and the application of complainant to select said land as indemnity not having been approved by the Secretary of the Interior, the Court erred in adjudging that the complainant by its Congressional grant had or acquired any right, title or interest, legal or equitable, to said land.

Second.—The said tract of land having been patented to defendant Otto Groeck prior to said land having been selected by the complainant as indemnity, and prior to any approval of such selection by the Secretary of the Interior, the Court erred in adjudging that in and by the issuance of said patent by the United States to defendant, Otto Groeck, the complainant was not finally concluded and estopped by such determination from having or claiming under its said grant any title or interest in said tract.

Third.—Upon the admitted facts disclosed by the pleadings and stipulations of the parties, the Court erred in adjudging that the complainant was not barred and estopped by laches from commencing or maintaining this suit.

Fourth.—The complainant never having filed a map of definite location on its whole road, but only of a part thereof, was not authorized to select any land as indemnity.

Wherefore, the defendants pray that said decree may be reversed and that the defendants may have an adjudication and decree in their favor as herein specified.

JOSEPH H. CALL,

Attorney and counsel for defendants.

*In the United States, Circuit Court, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,

Complainant,

vs.

OTTO GROECK and JENNIE L. MERRIL, and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merril, Deceased,

Defendants.

## Bond on Appeal

Know all men by these presents, that we, S. E. Biddle and A. D. King, of the county of Kings, State of California, are held and firmly bound unto the Southern Pacific Railroad Company, in the sum of two hundred dollars, to be paid to the said Southern Pacific Railroad Company; we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the second day of June, *June*, 1899.

Whereas, the defendants in the above-entitled suit have prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the decree rendered and entered in said cause on thirty-first day of May, 1899.

Now, therefore, the condition of this obligation is such

that if the said defendants shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

S. E. BIDDLE.
A. D. KING.

State of California, } ss.
County of Kings. }

S. E. Biddle and A. D. King, sureties named in the foregoing bond, being first sworn each for himself, says:

That he is a resident and freeholder in the county of Kings, State of California, and is worth the sum of two hundred dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

S. E. BIDDLE.
A. D. KING.

Subscribed and sworn to before me this second day of June, 1899.

[Seal] ANDREW G. PARK,
Notary public for the county of Kings, State of California.

The foregoing bond is approved this fifth day of June, 1899.

ROSS,
Circuit Judge.

[60c. Int. Rev. Stp.]

[Endorsed]: No. 347. In United States Circuit Court, Southern District California. Southern Pacific Railroad Company vs. Otto Groeck et al. Petition for and order allowing appeal. Assignment of errors and bond.

Filed June 5, 1899. Wm. M. Van Dyke, Clerk, E. H. Owen, Deputy. Joseph H. Call, counsel and attorney for defendants.

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At a stated term, to wit, the January term, A. D. 1899, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the courtroom in the city of Los Angeles, on Monday, the fifth day of June, in the year of our Lord one thousand and eight hundred and ninety-nine. Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merrill, Deceased,
Defendants,
No. 347.

**Minute Order Allowing Appeal and Approving Bond.**

The said defendants having, this fifth day of June, A. D. 1899, being a day in the January term, A. D. 1899, of said Circuit Court of the United States, by Joseph H. Call, Esq., their attorney, prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree heretofore, to wit, on the thirty-first

day of May, 1899, being a day also in the January term, A. D. 1899, of said Circuit Court, filed and entered of record, in said Circuit Court, and it appearing to the Court that said above-named defendants are entitled to an allowance of an appeal, they having taken said appeal within the time allowed by law, it is ordered that the appeal of said appellants to the United States Circuit Court of Appeals for the Ninth Circuit from said decree filed and entered as aforesaid, be and the same hereby is allowed; and it is further ordered that a transcript of the record, pleadings, papers and proceedings of said Court in the above-entitled cause, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as provided by law, and the rules of said Court. It is further ordered that the undertaking on appeal given herein in the sum of two hundred dollars ($200.00), tendered by said defendants, be, and the same hereby is, approved as the undertaking on appeal herein.

*In the Circuit Court of the United States, Ninth Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
OTTO GROECK et al., Defendants.
No. 347.

## Stipulation as to Transcript of Record.

It is admitted that the plaintiff's original complaint in this cause was filed on February 11, 1892, subpoena taken on February 11, 1892, and duly served on the defendants prior to February 25, 1892; and that the facts, cause of action and relief sought in the said original complaint are the same as in plaintiff's amended complaint filed herein on July 6, 1896.

It is stipulated that in transcribing the record of this cause on the appeal to be taken by the defendants to the United States Circuit Court of Appeals, all pleadings and documents filed, and proceedings had, prior to July 6, 1896, may be omitted as immaterial and unnecessary parts of the record on appeal herein.

Dated and signed on June 8, 1899.

WM. SINGER, Jr.,
Attorney for the plaintiff.
JOSEPH H. CALL,
Attorney for the defendants.

[Endorsed]: No. 347. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Company vs. Otto Groeck et al. Stipulation.

Filed June 8, 1899. Wm. M. Van Dyke, Clerk, Chas. N. Williams, Deputy. Wm. Singer, Jr., rooms 61, 62, Union Trust building, San Francisco, Cal.

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*In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merrill, Deceased,
Defendants.
No. 347.

## Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing seventy-one (71) typewritten pages, numbered from one to seventy-one, inclusive, and com-

prised in one volume, to be a full, true and correct copy of the record, pleadings, papers, assignment or errors, and of all proceedings in the above and therein entitled cause (excepting all pleadings and documents filed and proceedings had prior to July 6, 1896, which are omitted from the transcript pursuant to the stipulation of the parties, hereinbefore set forth), and that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in said cause, under and pursuant to said stipulation.

I do further certify that the cost of the foregoing record is thirty-nine dollars and fifty cents, the amount whereof has been paid me by Otto Groeck and Jennie L. Merrill and Len Herriford, executrix and executor of the estate of C. S. Merrill; deceased, the appellants in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this first day of August, in the year of our Lord, one thousand eight hundred and ninety-nine, and of the independence of the United States the one hundred and twenty-fourth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Cancelled 10 ct. Int. Rev. Stamp.]

[Endorsed]: No. 552. United States Circuit Court of Appeals, Ninth Circuit. Otto Groeck, and Jennie L. Merrill and Len Herriford, executrix and executor of the Estate of C. S. Merrill, deceased, appellants, vs. The Southern Pacific Railroad Company, appellee. Appeal from the Circuit Court of the United States for the Southern District of California. Transcript of record.

Filed Aug. 3, 1899.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

80 At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the fifth day of February, in the year of our Lord one thousand nine hundred.

Present: The Honorable William B. Gilbert, circuit judge; William W. Morrow, circuit judge; Thomas P. Hawley, district judge.

OTTO GROECK ET AL., Appellants,
*vs.*
THE SOUTHERN PACIFIC RAILROAD COMPANY, Appellee. } No. 552.

On motion of William Singer, Jr., Esquire, counsel for the appellee, ordered appeal submitted to the court for consideration and decision on briefs.

81 In the United States Circuit Court of Appeals for the Ninth Circuit.

OTTO GROECK ET AL., Appellants,
*vs.*
SOUTHERN PACIFIC RAILROAD COMPANY, Appellee.

Joseph H. Call, for the appellants; William Singer, Jr., for the appellee.

Before Gilbert and Morrow, circuit judges, and Hawley, district judge.

GILBERT, circuit judge, delivered the opinion of the court:

In this suit a decree was rendered in the circuit court in favor of the appellee, The Southern Pacific Railroad Company, upon a bill in which the said railroad company, as complainant, sought to establish a trust in and to compel the conveyance of eighty acres of land, to which Otto Groeck had obtained a patent, which land, the bill alleged, had been granted by the United States in aid of the construction of the complainant's railroad. On a former appeal of the same case this court passed upon the principal questions which are involved. Southern Pacific Railroad Company v. Groeck, 87 Fed., 970. The case was then presented upon a plea to the bill. It now comes before the court upon issue joined upon an answer to the bill and a stipulated statement of the facts. Two questions in addition to those which were considered upon the former appeal are
82 now presented: First, was it necessary that the selection of the indemnity land by the railroad company, including the land which is in controversy in this suit, should have been approved by the Secretary of the Interior? And second, is the right

of the railroad company to the land in controversy affected by the fact that no map of the definite location of a certain portion of the road was ever filed? Upon the first point it is urged by the appellant that an absolutely essential step to the acquisition of the indemnity land was the approval of the selection thereof by the Secretary of the Interior. The granting act does not by its terms require that the selection shall be approved by the Secretary. The language of the act in that respect is that the indemnity land shall be selected by the company "under the direction of the Secretary of the Interior." It is urged that in this instance the selection was not made under the direction of the Secretary of the Interior for the reason that that officer had approved the pre-emption entry of Groeck, to whom had been issued a patent for the land, and had denied the right of the appellee to select this tract of land, and that under the circumstances it was impossible that the selection could have been made under the Secretary's direction. In the stipulation of the facts it is recited that the selection "was in the form and accompanied by the certificates, affidavits, costs, and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and the Commissioner of the General Land Office," and that the list was rejected "solely because of the pre-emption settlement, filing, entry, and patent of the defendant Groeck." It is stipulated also that the Secretary of the Interior had approved and issued a general circular of instructions relating to the adjustment of railroad land grants, prescribing the form and procedure for the selection by railroad companies of lands within the indemnity limits, and that the circular provided, among other things, that

"the lists must be carefully and critically examined by
83 the register and receiver and their accuracy tested by the plats and records of their office. When so examined and tested and found correct in all respects, they will become final locations and you will, on the payment of the requisite fees to the receiver, so certify." It is admitted that the railroad company complied with this circular in all respects. We entertain no doubt that the steps so taken entitled the company to a patent. On the former consideration of this case and upon the facts which now appear in the stipulation, we held that the pre-emption entry of Groeck was made upon land which had been reserved from settlement, and that it was therefore absolutely void, and that the railroad company was not, by its delay in building the road, barred from asserting its title to the land in question so long as the United States had declared no forfeiture of the grant on account of the delay and had not offered the lands to others for entry under the general land laws. Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the Secretary of the Interior whenever the grantee thereof complies with the directions which the Secretary has published for the regulation of such

selection. The Secretary was not clothed with the power to defeat the grant of the indemnity lands or by capricious regulation to affect the title which was intended to be conveyed, nor has the Secretary, in this instance, made any regulation which has injuriously affected the right of the grantee. He had the power to prescribe in advance the method of making such selection, and having prescribed it and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act. That the Secretary erroneously supposed that this land belonged to the defendant Groeck and was not subject to selection as indemnity land under the grant, cannot affect the substantial rights of the grantee.

It is contended that the railroad company never acquired
84 the right to select as indemnity land the tract in controversy for the reason that it did not file a map of the definite location of its whole route. It is said that the right to make selection of indemnity lands did not accrue until the filing of such map of definite location. The statement of facts recites that the railroad company filed maps in several sections of the definite location of the whole road, excepting the portion thereof between Alcalde and Tres Pinos, and that the said maps were filed along the line which was shown on the general-route map, and that that was the line upon which the road was constructed. In section 4 of the granting act of July 27, 1866, 14 Stats. at Large, 295, it is provided that when "it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid." By the granting act there was conferred upon the grantee a present grant of land incapable of identification at the date thereof, but the title to which when identified took effect by the reason of the grant itself, which grant conferred the right to select the granted lands opposite each twenty-five miles of road as the same was constructed and approved in the manner required by the act. No question is made that the road opposite
85 the land in controversy in this suit was so constructed, and that the map of the definite location of that portion of the road was filed, and that the said land was selected by the

company. The right of the company to select the land in controversy was not made to depend upon its filing a map of the definite location of every portion of the road or the construction of the entire road. In these respects the grant differs from that which was under consideration in the case of Cedar Rapids *v.* Herring, 110 U. S., 27. In that case the grant was of "every alternate section of land designated by odd numbers for six sections in width on each side," to take effect "as soon as the road is completed." The lands were to be withdrawn only when the company had filed a map definitely showing its line. Concerning the question when the company's right to select indemnity lands attached, the court, construing the language of the granting act, said: "We are of opinion that no right of selection in any of these lands accrues until the entire line of the road to be built has been established by the company and filed in the General Land Office, at Washington, and that until then no duty devolves on the Secretary to withdraw or withhold the land from sale or pre-emption. This is the necessary inference from the language both of the original grant of 1856 and the amendatory act of 1864." But in the case now before the court the granting act by its own terms withdrew the land when the general-route map was filed, as we held on the former appeal of this cause, and the indemnity lands were then withdrawn as well as the primary lands. The joint resolution of June 28, 1870, 16 Stat., 382, authorized the construction of the road, "as near as may be," along the line of the general route so established, and directed the Secretary "to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on, as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six." There is nothing in the provisions, either of the granting act or the joint resolution, to indicate that the right to select indemnity lands was dependent upon the completion of the whole line
86 of the road. On the contrary, it is clear that the intention was that such selections might be made immediately upon the construction and acceptance of each twenty-mile section. Both the primary lands and the lieu lands were to be patented as fast as the road was constructed and accepted and the indemnity lands were selected. Congress subsequently affirmed this construction of the grant by declaring forfeited the grant of lands coterminous with the uncompleted section of the road, thereby confirming the grant of lands coterminous with the remaining sections of the road as it was completed.

We find no error in the decree of the circuit court, and the decree will be affirmed.

(Endorsed:) Opinion. Filed May 7, 1900. F. D. Monckton, clerk.

87 United States Circuit Court of Appeals for the Ninth Circuit.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIford, Executrix and Executor of the Estate of C. S. Merrill, Deceased, Appellants,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Appellee. } No. 552.

Appeal from the circuit court of the United States for the southern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of California and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Decree. Filed and entered May 7, 1900. F. D. Monckton, clerk.

88 In the United States Circuit Court of Appeals, Ninth Circuit.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIford, Executrix and Executor of the Estate of C. S. Merrill, Deceased, Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Appellee. } No. 552.

*Petition for and Order Allowing Appeal.*

To the judges of the United States circuit court of appeals, ninth circuit:

The above-named appellants, conceiving themselves aggrieved by the decree made and entered herein on the seventh day of May, A. D. 1900, appeal from said decree to the Supreme Court of the United States and file herewith their assignment of errors asserted and intended to be urged upon appeal, and they pray that their appeal may be allowed.

Dated this eleventh day of May, 1900.

JOSEPH H. CALL,
*Attorney and Counsel for said Appellants.*

89 The foregoing petition for appeal is hereby allowed and granted, and it is further ordered that a transcript of the record shall be made under the hand and seal of the clerk of this court and transmitted to the Supreme Court of the United States, at Washington.

Dated this 16th day of May, A. D. 1900.

WILLIAM B. GILBERT,
*United States Circuit Judge, Ninth Circuit.*

90 In the United States Circuit Court of Appeals, Ninth Circuit.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merrill, Deceased, Appellants,
*vs.*
SOUTHERN PACIFIC RAILROAD COMPANY, Appellee.
} No. 552.

*Assignment of Errors.*

The appellants in the above-entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors, as to which matters and things they say that the decree entered herein on the seventh day of May, 1900, is erroneous, to wit:

First. The tract of land in this cause being situated outside of the granted limits of the grant of appellee and within the indemnity limits of appellee's grant, and the application of appellee to select said land as indemnity not having been approved by the Secretary of the Interior, the court erred in adjudging that the appellee by its congressional grant had or acquired any right, title, or interest, legal or equitable, to said land.

Second. The said tract of land having been patented to appellant Otto Groeck prior to said land having been selected by the appellee as indemnity and prior to any approval of such selection by the Secretary of the Interior, the court erred in adjudging that
91 in and by the issuance of said patent by the United States to appellant Otto Groeck the appellee was not finally concluded and estopped by such determination from having or claiming under its said grant any title or interest in said tract.

Third. Upon the admitted facts disclosed by the pleadings and stipulations of the parties, the court erred in adjudging that the appellee was not barred and estopped by laches from commencing or maintaining this suit.

Fourth. The appellee never having filed a map of definite location on its whole road, but only a part thereof, was not authorized to select any land as indemnity.

Fifth. The court erred in adjudging that the lands within the indemnity limits of the Southern Pacific railroad, including the land in suit, were withdrawn by operation of law upon filing the map of general route.

Sixth. As the land in suit was entered by appellant Groeck on September 2, 1885, and final proof made under the homestead law on June 7, 1886, and patent from the United States issued thereunder on April 11, 1890, the court erred in adjudging that the application to select or selection of the Southern Pacific Railroad Company, made on July 13, 1891, operated to confer upon the company any legal or equitable right to the land.

Wherefore the appellants pray that said decree may be reversed, and that the appellants may have an adjudication and decree in their favor as herein specified.

JOSEPH H. CALL,
*Attorney and Counsel for Appellants.*

92 In the United States Circuit Court of Appeals, Ninth Circuit.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of the Estate of C. S. Merrill, Deceased, Appellants,
*vs.*
SOUTHERN PACIFIC RAILROAD COMPANY, Appellee.
} No. 552.

*Bond on Appeal.*

Know all men by these presents that we, A. D. King and J. O. Hickman, of the county of Kings, State of California, are held and firmly bound unto the Southern Pacific Railroad Company in the sum of five hundred dollars, to be paid to the said Southern Pacific Railroad Company; we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of May, 1900.

Whereas the appellants in the above-entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause on the seventh day of May, 1900:

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

A. D. KING.
J. O. HICKMAN.

93 STATE OF CALIFORNIA, *County of Kings,* } *ss.:*

A. D. King and J. O. Hickman, sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the county of Kings, State of California, and is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. D. KING.
J. O. HICKMAN.

Subscribed and sworn to before me this 12th day of May, A. D. 1900.

[SEAL.] ANDREW G. PARK,
*Notary Public in and for the County of Kings, State of California.*

The foregoing bond is approved this 16th day of May, 1900.

WM. B. GILBERT,
*United States Circuit Judge, Ninth Circuit.*

(Endorsed:) Petition for and order allowing appeal. Assignment of errors. Bond on appeal. Filed May 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

94 United States Circuit Court of Appeals for the Ninth Circuit.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIford, Executrix and Executor of the Estate of C. S. Merrill, Deceased, Appellants,
*vs.*
THE SOUTHERN PACIFIC RAILROAD COMPANY, Appellee. } No. 552

*Certificate of Clerk C. C. A. to Transcript.*

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing ninety-three (93) pages, numbered from one (1) to ninety-three (93), inclusive, to be a full, true, and correct copy of the transcript of record, the order of submission, the opinion, the decree, the petition for and order allowing an appeal to the Supreme Court of the United States, and the assignment of errors and bond filed therewith in the above-entitled cause, as the originals thereof appear of record in my office, and that the same together constitute the transcript of record on appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 1st day of June, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled June 1, 1900. F. D. M.]

95 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Southern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days

from date of this writ, pursuant to an appeal duly allowed by the United States circuit court of appeals, ninth circuit, and filed in the clerk's office of said court on the 15th day of May, A. D. 1900, in a cause wherein Otto Groeck and others are appellants and you are appellee, to show cause, if any there be, why the judgment and decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of May, A. D. 1900.

WM. B GILBERT,
*United States Circuit Judge, Ninth Circuit.*

96 Service of a copy of the within citation is hereby admitted this 16th day of May, 1900.

WM. SINGER, Jr.,
*Att'y for Appellee.*

[Endorsed:] D. No. 552. In the United States circuit court of appeals, ninth circuit. Otto Groeck *et al.*, appellants, *vs.* Southern Pacific Railroad Company, appellee. Citation. Filed May 17, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. Joseph H. Call, solicitor for appellants.

Endorsed on cover: File No., 17,799. U. S. circuit court of appeals, ninth circuit. Term No., 314. Otto Groeck and Jennie L. Merrill and Len Herriford, executrix and executor of C. S. Merrill, deceased, appellants, *vs.* The Southern Pacific Railroad Company. Filed June 14, 1900.

# SUPREME COURT

OF THE

# UNITED STATES.

Appeal from U. S. Circuit Court of Appeals, Ninth Circuit.

**Otto Groeck, et al.,**
*Appellants,*

*vs.*

**Southern Pacific Railroad Company,**
*Appellee.*

## Brief for Appellants.

STATEMENT.

In this case the Southern Pacific Railroad Company filed its bill of complaint against the defendants on February 12, 1892 [Record 26], seeking to establish a trust in favor of complainant for a certain eighty acres of land in Kings county, California, and further seeking a decree requiring the defendants to convey the legal title to the complainant.

The land was acquired by the defendants from the United States by virtue of a pre-emption settlement

and entry made by defendant Groeck on September 2, 1885, final proof on June 7, 1886, and patent from the United States on April 11, 1890 [Record 63, 64].

The Southern Pacific Railroad claims to have a superior right to the land by virtue of the provisions of section 18 of the Act of Congress of July 27, 1866 [14 U. S. Stat. 292], and the provisions of the joint resolution of Congress of June 28, 1870 [16 U. S. Stat. 382], making a land grant to aid in the construction of a railroad from San Francisco, via Mojave, to the Colorado river at Needles.

The first and only authority which the Southern Pacific had to construct this railroad and to receive a grant of lands upon the line from San Francisco, via Mojave to Needles, was granted by the joint resolution of June 28, 1870 [Sec. 25 L. D. 223, 229, and 98 Fed. 27, 39], but for the purposes of disposing of this case it is not important whether the grant was made in 1870 or in 1866.

The Southern Pacific Company completed the railroad from San Jose, via Mojave to Needles (in sections), at various dates between 1870 and 1889, *excepting that part between Alcalde and Tres Pinos* [Record 61, 62], and, as the road was constructed, filed sectional maps of definite location showing the completed road, but never filed any map of definite location of that part of the road between Alcalde and Tres Pinos [Record 61, 8th item].

The Southern Pacific filed its map of definite location of that section of road opposite to the land in controversy on *April 2, 1889* [Record, 61 bottom, 62 top, and 63 top].

The land in dispute is outside of the granted limits of the road, but within the indemnity limits; that is, the limits within which the railroad was authorized to make selections under the direction of the Secretary of the Interior in lieu of lands lost within the place limits [Record 62, bottom].

The Southern Pacific made application to select this land as indemnity on July 13, 1891 [Record 64], which was *six years* after defendant Groeck settled upon and pre-empted the land, a year and a third after the land was patented to defendant Groeck under his pre-emption entry, and *twenty-one years* after the passage of the joint resolution of Congress of June 28, 1870, making the grant of lands under which complainant claims title, and by the terms of which act the Southern Pacific was authorized at that time to file a map of definite location and select indemnity lands.

The defendants answered to the merits, and the cause was submitted upon stipulated facts [Record 59-66], and thereupon the court adjudged the equities to be with the complainant, and passed a decree for the relief sought. [Record 41.] Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was affirmed. [Record 85.]

**Specifications of Errors.**

Appellants' assignment of errors is in the Record at pages 86, 87.

# Points and Authorities.

## FIRST.

**The Controlling Questions in this Case, Namely, that there was no Authority to Withdraw the Indemnity Lands, as Against Homestead and Pre-emption Entries, and that Patents Issued to Settlers Under Such Entries are Valid, has Been Lately Presented and Fully Determined by the Court Adversely to the Contentions of the Appellees in the Present Case.**

In the following cases, fully argued, submitted and determined and opinion filed on January 7, 1901, it was decided by the court in construing the grant to the Northern Pacific Railroad Company, act of Congress July 2, 1864 [13 Stat. at L. 365, chapter 217], which is identical with the grant to the Southern Pacific and Atlantic and Pacific Railroads of July 27, 1866, 14 Stat. at L. 292.

1. That the act did not provide for a withdrawal or reservation of indemnity lands;

2. That the Secretary of the Interior was not authorized to reserve the indemnity lands;

3. That the act contemplated that the indemnity lands were to remain open to homestead and pre-emption entry; and

4. That patents issued to settlers, under the homestead and pre-emption laws, within such indemnity limits, based upon entries made prior to a selection by the railroad company, approved by the Interior Depart-

ment, were valid as conveyances of the land against the railroad title.

See

Hewitt v. Schultz, 180 U. S. 139
Powers v. Slaght, 180 U. S. 173
Moore v. Stone, 180 U. S. 180
Moore v. Cormode, 180 U. S. 167

These recent and carefully considered decisions of the court upon these vital questions, which fully control the issues in the present suit, renders it unnecessary to further argue them, as the contentions now made by counsel for appellees were made and fully presented and denied by the court in the argument in the former suits.

## SECOND.

**In Filing its Map of General Route on January 3, 1867, and Securing a Temporary Reservation at that Time, the Southern Pacific did not Acquire, by Virtue Thereof, any Right or Title to any Lands Along the Line.**

New Orleans Railroad v. Parker, 143 U. S. 42, 57, 58;
United States v. Southern Pacific, 146 U. S. 570, 599, 600;
Southern Pacific v. United States, 168 U.S. 1, 41, 42;
United States v. Oregon Railroad, 176 U. S. 28.

The act of Congress, under which the Southern Pacific claims title, does not provide that any title or right shall vest in the company prior to definite loca-

tion of the road, but fixes the time of filing that map as the time when its grant to lands in place shall attach, and requires the company to *select* indemnity lands to which it may be, entitled, under the direction of the Secretary of Interior.

In requiring the company to file a map of general route by section 6 of the act, there is no provision whatever for the withdrawal of the lands within the indemnity limits, and certainly no provision granting any title prior to definite location.

Obviously the requirement that the company should file a map of general route was not wholly for the benefit of the company, but to protect the public as well, and to inform the Land Department of the general route of the road, prior to definite location. Even if this section had required a withdrawal of lands that would not pass title to the company, in view of the express requirement of section 3 of the act that the company should file a map of definite location and that title should pass only at that time.

## THIRD.

**Until Selection of Indemnity Land has been Made by the Company, Approved by the Secretary of the Interior, no Right or Title Passes to the Company.**

Wisconsin Central Railroad v. Price County, 133 U. S. 496, 511, 512;

Ryan v. Railroad Company, 99 U. S. 382, p. 386;

St. Paul Railroad v. Winona Railroad, 112 U. S. 720, p. 731;

Sioux City Railroad v Chicago Railroad, 117 U.S. 406, p. 408;
Barney v. Winona Railroad, 117 U. S. 228, p. 232;
Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 41, 42;
United States v. Missouri Railroad, 141 U. S. 358, p. 374;
New Orleans Railroad v. Parker, 143 U. S. 42, pp. 57, 58;
Southern Pacific Railroad v. Wood, 124 Cal. 475, 481;
Hewitt v. Schultz, 180 U. S.

The settled doctrine of the court upon this question which was applied in Wisconsin Railroad v. Price county, *supra*, 133 U. S. 496, 511, 512, is there expressed by the court in the following language:

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place,

whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands, and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established, and in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States."

In harmony with these decisions of the court is a long line of decisions of the Interior Department, running through a series of many years, uniformly holding that no right or title to any particular tract of

indemnity land passes until it has been selected and approved, and until which time the land is open to disposal by the Land Department.

Brady v. S. P. R. R. Co., 5 L. D. 658;
Secretary Lamar to President, 6 L. D. 77;
Atlantic and Pacific R. R. Co., 6 L. D. 84, 85;
N. P. R. R. Co. v. Miller, 7 L. D. 100;
S. P. R. R. Co. v. Meyer, 9 L. D. 250;
N. P. R. R. Co. v. Walters, 13 L. D. 330;
S. P. R. R. Co. v. Wasgatt, 13 L. D. 145;
S. P. R. R. Co. v. McWharter, 14 L. D. 610;
S. P. R. R. Co. v. Waters, 17 L. D. 270;
S P. R. R. Co., 18 L. D. 314;
S. P. R. R. Co. v. McMahon, 21 L. D. 402;
N. P. R. R. Co. v. Lillethun, 21 L. D. 487;
S. P. R. R. Co. v. McKinley, 22 L. D. 493;
S. P. R. R. Co. v. Kanawyer, 23 L. D. 500;
N. P. R. R. Co. v. Ayers, 24 L. D. 40;
S. P. R. R. Co. (joint resolution of 1870), 25 L. D. 223;
S. P. R. R. Co. v. Davis, 26 L. D. 595;
N. P. R. R. Co. v. Gunther, 26 L. D. 340;
Lund v. N. P. R. R. Co., 27 L. D. 348;
N. P. R. R. Co. v. Blain, 27 L. D. 361;
State of California v. S. P. R. R. Co., 27 L. D. 542.

Upon well settled principles the uniform construction of these laws by the Interior Department should not be overturned, unless clearly wrong.

United States v. Graham, 110 U. S. 219;
United States v. Philbrick, 120 U. S. 59;
Hastings Railroad v. Whitney, 132 U. S. 360.
Hewitt v. Schultz, 180 U. S.

**FOURTH.**

**When the Selection has been Approved by the Secretary of the Interior the Equitable Title Passes to the Company, but only when Patent is Issued, Under the Provisions of Section Four of the Act of July 27, 1866, Does the Full Legal Title Pass, and Until Patented the Land is Within the Control of the Interior Department.**

It is required by the Act of July 27, 1866 (Section 4), as well as by the amendatory act or resolution of June 28, 1870, that the title to lands earned by the company shall pass by the issuance of a patent.

The patent of the United States is the solemn instrument provided by law as complete evidence of the performance of all conditions by the patentee, and as a determination of all *facts* favorable to the patentee which are required to be established as antecedent to its issuance and is full and complete evidence of the passing of the legal title.

It is the settled doctrine in the disposal of the public lands that where a patent is required or contemplated the legal title and control of the land can not pass from the Land Department without its issuance, as there are many questions of fact to be determined by the Land Department, which has exclusive jurisdiction of such matters, and many matters of discretion are involved.

In Barden v. Northern Pacific Railroad, 154 U. S. 288, 327, the court said:

> "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any

portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

And in applying the principle the court held that the determination as to the mineral character of lands was vested exclusively in the Land Department.

In Wisconsin Railroad v. Price County, 133 U. S. 496, it was distinctly decided, upon a full review of the authorities, that in the matter of the selection of railroad indemnity lands there were antecedent facts to be determined by the Land Department and judicial discretion to be exercised by the Secretary of Interior, and it is necessary for the Land Department to determine whether such a loss has been made in place limits as authorized the selection of indemnity, whether the land sought to be selected is open to be taken as such indemnity, and whether it is of the character of land which the company might select, and it might be added that it must be determined whether the applications to select are in due form, whether the land is mineral land, swamp land, coal land, or whether it is otherwise public agricultural land subject to selection. These, as well as numerous other antecedent questions, must be determined by some tribunal, and if not by the Interior Department, then by whom? It can not be possible that these questions can be determined by the railroad com-

pany in its own favor, and its judgment enforced by legal proceedings in the courts.

In Michigan Land Company v. Rust, 168 U. S. 589, 592, it was adjudged that under the swamp land act of 1850, which provided for a listing of the land, to be approved by the Interior Department, and a patent in due form of law, that even after the land had been listed and certified, that the Interior Department had the power to review the proceedings, cancel the listing and patent the land to another under a later entry.

In Brown v. Hitchcock, 173 U. S. 473, which also arose under the swamp land act, it was held that the legal title did not pass until patent issued, and that all questions of facts and proceedings were open to review and reconsideration in the Interior Department, prior to issuance of patent.

In Rogers Locomotive Works v. American Emigrant Company, 164 U. S. 559, 574, it was adjudged that lands claimed under the swamp land grant of 1850, which were included in a list certified to the state under a railroad grant, that such certification was a conclusive determination by the Interior Department of the non-swamp character of the land.

In the recent case of Hawley v. Diller, 178 U. S. 476, it was held that even after entry and final proof of a tract of land under the timber and stone act, that the Land Department had the power to cancel the entry and issue a patent to another under a different entry.

From these authorities it cannot be reasonably doubted that the Land Department is a special tribunal clothed at least with quasi-judicial powers, having ex-

clusive jurisdiction and control of the public lands, and that its determination of all questions of fact is conclusive, and that it may exercise wide discretion as to other matters preliminary to the issuance of patent.

Such being the law, it is submitted that until the selection of the Southern Pacific had been approved prior to a disposal of this land for other purposes or to another, that no right or title was vested in the company, and that when so approved, equitable title would pass, subject to be cancelled or annulled by the Interior Department, upon reasonable or proper grounds, and that when only patent issues can the company acquire a full legal title.

As this tract of land was patented to defendant Groeck long before the company even applied to select the land, it is submitted that no right or title is vested in the company.

**FIFTH.**

**The Facts Found by the Land Department Upon the Issuance of the Patent to Defendant Groeck are Conclusive Against the Southern Pacific.**

Authorities *supra*.

Also,

Steel v. Smelting Company, 106 U. S. 447, 457:
Lee v. Johnson, 116 U. S. 48;
Heath v. Wallace, 138 U. S. 573, 585;
United States v. Marshal Company, 129 U. S. 579, 588;
Russell v. Maxwell Land Grant Company, 158 U. S. 253;

## SIXTH.

**The Complainant's Suit is Barred by Laches.**

As pointed out in the foregoing statement the complainant was authorized to file its map of definite location and select the indemnity lands as early as 1870.

It did nothing in that respect until it filed the section of its map of definite location opposite the land in suit on April 2, 1889, *which was nineteen years of delay and procrastination.*

The railroad did nothing after that toward selecting the land until in 1891, more than a year after the land had been patented to defendant Groeck and six years after the date of Groeck's preemption.

It would seem that if there were any case in equity to which the doctrine of laches should be applied that it is presented here.

The complaint in agreed facts admits that Groeck has resided upon the land, cultivated and improved it during many years, and now, at this late date, the railroad company concludes it would like to take the land.

It is submitted that this is not equitable or just, and that such a claim cannot be sustained in a court of conscience.

Of course, the defendant cannot be placed in *statu quo*, as the six and a half years spent by Groeck in reclaiming the land from the desert, while the railroad company stood silent and by its acquiescence encouraged the work, cannot be restored to him.

While courts of equity uniformly apply the bar of the statute, by analogy, within the time provided for by statutes of limitations, in the following cases the

bar of laches appears to have been applied in a shorter period than provided by any statute of limitations:

Twin Lick Oil Company v. Marbury, 91 U. S. 587, pp. 591-593;
Brown v. Buena Vista Co., 95 U. S. 157;
Hayward v. National Bank, 96 U. S. 611, p. 617;
Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 39-42;
Holgate v. Eaton, 116 U. S. 33 pp. 40, 41;
Davison v. Davis, 125 U. S. 90, p. 98;
Societe v. Milliken, 135 U. S. 304, p. 308;
Makall v. Casilear, 137 U. S 556, p. 566;
Felix v. Patrick, 145 U. S. 317, p. 332;
Johnson v. Standard Company, 148 U. S. 360, p. 369;
Halstead v. Grinnon, 152 U. S. 412, p. 416;
Alsop v. Riker, 155 U. S. 445, pp. 458-460;
Continental Bank v. Heilman, 86 Fed. 514, 517, (C. C. A.)

But however this may be, in California, an action to recover real estate must be brought within five years.

Code Civil Procedure, Sec. 318.

Indeed, courts of equity sometimes are so averse to granting relief where there has been great delay or where the parties cannot be placed in *statu quo* or where by the acquiescence of the complainant the defendant has been suffered to make expenditures, that the court will, upon its own motion, apply the bar of laches, even where not raised by the parties by demurrer, plea, answer or argument.

Alsop v. Riker, 155 U. S. 448, pp. 458-460;

Willard v. Wood, 164 U. S. 502, pp. 524, 525;
Whitney v. Fox, 166 U. S. 637, p. 647;
Penn. Insurance Company v. Austin, 168 U. S., 685, p. 696.

It was suggested in the opinion of the Court of Appeals that the failure of the railroad to file its map of definite location was not such laches as could be availed of by the defendant, but that the government alone could complain.

In this thought the important decision of the court in Cedar Rapids Railroad v. Herring, 110 U. S. 27, at pp. 39, 42, appears to have been insufficiently considered.

In that case the very point under consideration was as to the effect of the failure of the railroad *for three years* to file its map of definite location and select the land, and it was distinctly adjudged that the failure to perform those acts prevented a recovery by the railroad company against the homestead settlers. And the court said, at p. 41:

> "*If plaintiff has been injured it is by its own laches. If there is no land to satisfy its demands it is because it delayed over three years to file its map to establish the line of its road, and for years afterward to make selections*"

In conclusion, it is submitted that the decree of the courts below should be reversed, and the cause remanded with instructions to dismiss the bill.

JOSEPH H. CALL,
*Counsel for Appellants.*

No. 82.

NOV 23 1901
JAMES H. McKENNEY,
Clerk.

Payson & Evarts for Appellee

# Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 23, 1901.

No. 82.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of C. S. Merrill, deceased,

*Appellants,*

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY,

*Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

# Brief on Behalf of the Appellee.


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## BRIEF ON BEHALF OF THE APPELLLEE.

### Statement.

By an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and approved July 27th, 1866

(14 U. S. Stat., p. 292), the Southern Pacific Railroad Company was authorized to construct a line of railroad connecting with the Atlantic and Pacific Railroad, formed under the same act of Congress, at such point near the boundary line of the State of California, as it should deem most suitable for a railroad line to San Francisco. To aid in the construction of the proposed line of railroad a grant of land was given to the Southern Pacific Railroad Company along the line of its railroad in the State of California of ten alternate sections of land per mile on each side of the railroad, whenever the United States had full title thereto not granted, sold, reserved, occupied by homestead settlers or otherwise appropriated, and when said land was free from pre-emption, or other claims or rights at the time the line of route was designated by a plat thereof, filed in the office of the Commissioner of the General Land Office. By the terms of the grant it was also provided that in case any of such ten alternate sections or parts of sections should have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of at the time the line of route was designated, other lands should be selected by the railroad company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers of not more than ten miles beyond the limits of the first ten alternate sections.

On December 27, 1866, the railroad company duly accepted the land grant and the terms and conditions of

the said act of Congress of July 27, 1866, and filed such acceptance in the office of the Secretary of the Interior (Record, p. 60).

Thereafter and on the 3d day of January, 1867, the railroad company filed a map of the general route of the entire railroad it was authorized to construct under said act of Congress in the office of the Commissioner of the General Land Office, and on that day the Secretary of the Interior and the said commissioner duly accepted and approved the said map and the general route shown thereon (Record, p. 60).

The Southern Pacific Railroad Company began the building of its railroad in the State of California in 1870 and completed the construction of that portion thereof extending from San Francisco to the Needles by way of Mojave in 1888. The last section, extending from Huron westerly to Alcalde, was built during that year, and the entire railroad was constructed upon the line shown on the map of general route filed January 3, 1867 (Record, p. 61).

The east one-half of southwest one-quarter of Section 19, in Township 8 south, Range 1 east, Mount Diablo meridian, containing eighty acres, was a tract of land within the place limits of the grant to the Southern Pacific Railroad Company, and was at the time of said grant otherwise disposed of, and in lieu of said eighty acres the railroad company was at all times entitled to select eighty acres of land within the indemnity limits of its grant (Record, p. 62).

The eighty acres of land involved in this case are located in the south one-half of southeast one-quarter of Section 17, in Township 24 south, Range 17 east, Mount Diablo meridian. They are distant more than twenty miles from, but lie within thirty miles of, the road shown on the map of general route filed by the railroad company on January 3, 1867, and are distant more than twenty miles from, but lie within thirty miles of, the line of the railroad as definitely located and constructed, and are opposite to and coterminous with the section of railroad extending from Huron westerly to Alcalde, the map of which section was accepted and approved by the President of the United States on November 8, 1889 (Record, p. 62).

On the 2d of September, 1885, the defendant Otto Groeck settled upon the land just described, and on September 7, 1885, filed his pre-emption declaratory statement for the land in the United States Land Office, and thereafter applied to the Register of said Land Office to make final proof under the pre-emption laws of the United State, and on June 7, 1886, he was permitted to and did make proof in said Land Office that he was a qualified pre-emptor at the time he settled upon said land. Thereafter, and on April 11, 1890, a patent in due form of law was issued by the United States to the defendant Groeck conveying the said land to him in pursuance of his pre-emption entry thereon (Record, pp. 63 and 64).

On the 13th day of July, 1891, the Southern Pacific Railroad Company duly selected the land in question

in lieu of the eighty acres heretofore referred to within the place limits of its grant, which had been previously disposed of by the United States, at the time of the filing of its map of definite location on January 3, 1867. This selection was made in proper form, and in all respects as required by the instructions issued by the Secretary of the Interior, and under the direction of the Secretary of the Interior (Record, p. 64).

After its selection of the land in controversy, and on or about the 6th day of July, 1896, the Southern Pacific Railroad Company filed its amended bill of complaint in the United States Circuit Court for the Southern District of Cailfornia, praying that it might be declared that it was the lawful owner of the land in controversy, and that the defendants held the legal title thereto in trust for it (Record, p. 4). The answer to the amended bill of complaint was filed on August 1, 1898 (Record, p. 34), and on the 31st day of May, 1899, a final decree was entered in the suit granting the prayer of the bill and directing the defendants to execute a deed granting and conveying to the Southern Pacific Railroad Company the lands described in the complaint (Record, p. 41).

From this final decree an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 7th day of May, 1900, the judgment and decree of the United States Circuit Court for the Southern District of California was affirmed (Record, p. 85).

From the judgment of the Circuit Court of Appeals affirming the decree below this appeal has been taken.

## THE CASE OF HEWITT VS. SCHULTZ, 180 U. S., 139.

Before proceeding to the argument of the case at bar it may be well to consider the late decision of Hewitt vs. Schultz, 180 U. S., 139. Counsel for the appellants will perhaps claim that this case tends to sustain their position. As we understand it, however, its facts would seem to preclude it from having any real bearing upon the question now before the Court.

The Hewitt case was an action in ejectment brought to recover the possession of certain land situated *outside of the forty-mile limit, but within the fifty-mile limit*, of the grant to the Northern Pacific under the Act of July 2, 1864. That is to say, the land in the Hewitt suit was not within the land which was withdrawn by the sixth section of the Northern Pacific Act and exempted thereby from sale, entry or pre-emption, except by the railroad company, but was expressly declared by said section to be subject to the operation of the pre-emption laws. The plaintiff Hewitt claimed to be the owner in fee by virtue of a patent issued to him by the United States. The defendant asserted title to the land as a purchaser from the Northern Pacific Railroad Company, which claimed to own it by virtue of the Northern Pacific Act. In the trial court the plaintiff was successful, but on appeal

to the Supreme Court of North Dakota the judgment was reversed. The case was then brought to this Court by writ of error under Section 709 of the United States Revised Statutes, upon the ground that the judgment of the North Dakota Court denied to Hewitt rights and privileges specially set up and claimed by him under the Laws of the United States.

The question before the Court, as stated by Mr. Justice HARLAN at page 141, was as follows:

> " It may be here observed that the controlling " question in this case is whether it was compe- " tent for the Secretary of the Interior upon receiv- " ing and approving the map of the definite loca- " tion of the road, to make the above order of " withdrawal in respect to the odd-numbered sec- " tions of land within the indemnity limits—*that* " *is, of lands between the forty-mile and fifty-mile* " *limits.*"

Mr. Justice HARLAN at page 145 again formulated the case presented as follows:

> " Did Congress intend by that act [Northern Pa- " cific act], to declare that when the rail- " road company indicated its line of defi- " nite location the odd-numbered sections *outside* " *of the forty-mile limit and within the fifty-mile* " *limit*, on each side of such line, along the whole " of the line thus located, should not be subject " to the pre-emption and homestead laws until it

" was finally ascertained whether the railroad
" company was entitled by reason of the loss of
" lands within the place or granted limits to go
" into the indemnity limits in order to obain lands
" to meet such loss."

The very same question had arisen in the Interior Department in the case of Northern Pacific Railroad Company v. Guilford Miller, 7 L. D., 100, in which Secretary Vilas held that the Northern Pacific Act forbade the Land Department to withdraw from the operation of the Pre-emption and Homestead Laws any lands *outside of the forty-mile limits of the grant and inside the fifty-mile limit.* The decision of this Court in the Hewitt case followed the decision of Secretary Vilas in the Guilford Miller case solely upon the ground of *stare decisis.* The syllabus of the Hewitt case is as follows:

" that the question could not be said to be free
" from doubt, but that it was the settled doctrine
" of the Court that, in case of ambiguity, the Ju-
" dicial Department will lean in favor of a con-
" struction given to a statute by the Department
" charged with the execution of such statute, and,
" if such construction be acted upon for a number
" of years, will look with disfavor upon any sud-
" den change, whereby parties who have con-
" tracted with the Government upon the faith of
" such construction may be prejudiced."

The inference from this language is that, if it had been a case of first impression, with no construction of the statute by the Land Department, this Court would have come to a contrary conclusion. At all events, we take it that the Hewitt case is an authority only in cases in which the facts are substantially the same, and will not be necessarily followed by this Court in any case in which the facts are so radically different as they are in the case at bar.

The important circumstances which distinguish this case completely from the Hewitt case are that the land in controversy here is within the indemnity limits of the grant to a railroad passing through a State, and within the statutory withdrawal of the forty-mile strip under the sixth section of the Act of July, 1866, while the land in the Hewitt case fell within the indemnity limits of the grant within a Territory, and was beyond the forty-mile statutory withdrawal and not withdrawn from sale by the sixth section of the Northern Pacific Act, but was expressly declared to be still subject to the operation of the pre-emption laws. The importance of this difference is at once obvious, when it is remembered that by the sixth section of the Atlantic and Pacific Act, as well as by the sixth section of the Northern Pacific Act, all the land of the railroad within forty miles thereof was withdrawn from sale, entry or pre-emption, except by the railroad company, and that therefore the question of the right of the Secretary of the Interior to withdraw the eighty acres here in controversy from the operation of the

Pre-emption and Homestead Laws, which was the only question in the Guilford Miller and the Hewitt cases, is not presented in this case.

The real question now before the Court is, whether the lands of the odd-numbered sections granted to the railroad within forty miles of its line of road are open for sale, entry or pre-emption by any person other than the railroad company. So far as we know, this question is presented to the Court now for the first time in this case and the case of the Southern Pacific Railroad Company v. Isaac T. Bell, No. 20, argued and submitted herewith, and has never been passed upon by the Interior Department adversely to our contention.

## FIRST POINT.

**The railroad company was entitled to a patent to the land in question as soon as selection thereof had been made.**

Substantially the only question in this case is: What is meant by the words "land hereby granted" found in Section 6 of the Atlantic and Pacific Act? This section is as follows:

> "And be it further enacted, that the President "of the United States shall cause the lands to be

" surveyed for forty miles in width on both sides " of the entire line of said road after the general " route shall be fixed, and as fast as may be re- " quired by the construction of said railroad ; and " the odd sections of land hereby granted shall " not be liable to sale or entry or pre-emption be- " fore or after they are surveyed, except by said " company, as provided in this act ; but the provis- " ions of the act of September, eighteen hundred " and forty-one, granting pre-emption rights, " and the acts amendatory thereof, and of " the act entitled ' An act to secure homesteads to " ' actual settlers on the public domain,' approved " May 20, 1862, shall be, and the same are hereby, " extended to all other lands on the line of said " road when surveyed, excepting those hereby " granted to said company" (14 U. S., Stat., pp. 292, 296).

It is to be noticed that the first sentence of this section relates to the lands for forty miles in width on both sides of the railroad. The purpose of the section was to enact certain provisions in regard to this strip of forty miles, and it would seem but natural that the balance of the section should relate to the same lands mentioned in its first sentence, and when the words " land hereby granted " are thereafter used in this section a proper construction thereof would seem to warrant the insertion of the words contained in the first sentence, viz. : " for forty miles in width on

both sides of the entire line," so that the second sentence of the section would read as follows:

> " And the odd-sections of land for forty miles
> " in width on both sides of the entire line hereby
> " granted shall not be liable to sale or entry."

The same insertion in the last line of the section would also seem to be in accord with the intention of Congress. In other words, the entire section relates to the lands within forty miles in width on both sides of the railroad, and, when in the section the words " hereby granted " are used, it is as a qualification of and with reference to the land to which the section relates—viz., the land within forty miles on both sides of the line of the road—so that there should be inserted in the last line of the section the words of the first sentence, so as to read as follows:

> " excepting those for forty miles in width on both
> " sides of the entire line of said road hereby
> " granted to said company."

It may very well be that Congress had in mind the sparsely settled condition of the country within the Territories, and, when it had under consideration Section 6 of the Atlantic and Pacific Act, determined that it was only necessary for the interest of the railroad company to withdraw the land within the place limits of the grant when the road passed through a Territory, for the reason that there would be very few losses

within the place limits in a Territory to be made good to the railroad company out of the indemnity limits, and that for that reason it was hardly worth while to withdraw the land within such indemnity limits from sale to and pre-emption by the general public during all of the time of the building of the railroad. In other words, Congress may have been of the opinion that very little of the land within the indemnity limits of the road as it passed through the Territories would be needed to make good the losses within the place limits, and that it was therefore unnecessary to withdraw such land from sale and entry. At the same time it was very obvious that the land (whether within indemnity or place limits) along the line of that part of the road which ran through a State would probably be largely otherwise disposed of prior to the filing of the map of general route, and that very likely the entire grant of lands within the indemnity limits would be required by the railroad company in order to make good the losses within its place limits. For that reason it seemed best to Congress to create a statutory withdrawal of such land. This was accomplished by Section 6 of the Atlantic and Pacific Act, which withdrew from sale, entry or pre-emption the odd sections of land granted to the railroad within forty miles of its line. In other words, when the railroad passed through a Territory the lands within its place limits were alone withdrawn from sale, and the lands within its indemnity limits were left subject to the operation of the pre-emption laws. When the railroad passed

through a State the land within the indemnity limits was withdrawn from sale or pre-emption, as well as the land within the place limits, for the reason that it would all be undoubtedly required to make good the deficiencies within the place limits.

We know of no decision contrary to the construction of the sixth section of this act, which is above suggested.

In the case of Hewitt vs. Shultz the construction placed upon the act by the Court is in no way opposed to the views now expressed by us. At page 147 it was said :

> " It is contended that, construing the third and " sixth sections together, it is clear that the words " ' the odd sections of land hereby granted,' in " the first part, and the words ' excepting those " ' hereby granted to said company,' in the latter " part of the sixth section, refer to the lands de- " scribed in the first section of the act ; that is, to " the odd-numbered sections in the place limits " which were free from pre-emption or other claims " or rights, and had not been appropriated by the " United States prior to the definite location of " the road ; that as ' to all other lands on the line " ' of the said road when surveyed,' the act ex- " pressly declares that the provisions of the pre- " emption act of 1841, and the acts amendatory " thereof, and of the homestead act of 1862, " should extend to them ; that Congress took

" pains to declare that it did not exclude from
" the operation of those statutes any lands except
" those granted to the company in the place
" limits of the road, which were unappropriated
" when the line of the railroad was fixed; and
" that, if at the time such line was definitely fixed
" it appeared that any of the lands granted—that
" is, lands in the place limits—had been sold,
" granted, or otherwise appropriated, *then, but not*
" *before, the company was entitled to go into the*
" *indemnity limits beyond the forty-mile and with-*
" *in the fifty-mile line;* and under the direction of
" the Secretary of the Interior, and not otherwise,
" select odd-numbered sections to the extent
" necessary to supply the loss in the place limits.
" It is also contended that the object of the refer-
" ence in the sixth section of the Northern Pacific
" act to the pre-emption and homestead acts could
" only have been to bring the odd-numbered
" sections in the indemnity limits within the
" operations of those acts."

It is seen from reading the paragraph just quoted from the Hewitt case that the attention of the Court was directed entirely to the question of the lands granted to the railroad within a Territory, and that the whole decision rested upon that fact. There was no intention upon the part of the Court to construe this section with regard to the grant of lands to the railroad within a

State, and the decision, as it seems to us, was really in accord with our proposition, that the statutory withdrawal applied only to the lands which were granted within forty miles of each side of the railroad, and not to the lands without the forty-mile limit and within the fifty-mile limit.

In the case of St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company, 139 U. S., 1–9, it was said by Mr. Justice FIELD:

> "The right of the plaintiff, the Northern Pacific "Railroad Company, to the lands in place along "the line of its route, as definitely located in the "*State* of Minnesota, and to other lands to make "up deficiencies within those limits, caused by "previous grants, sales, reservations, settlements "or pre-emptions to be taken from the indemnity "limits, or *within the forty-mile withdrawal*, will "not admit of serious doubt, unless a prior right "attached to those lands by an earlier grant of "the United States."

The question then decided by the Court would seem to be the same as that presented in the case at bar; and it was there held, that the indemnity lands as well as the place lands along the line of the railroad, when it passed through the *State* of Minnesota were withdrawn by section six from sale, entry or pre-emption, unless some prior right attached to those lands. That is to say, no right could be subsequently given to these

indemnity lands by the United States, which would affect the grant and statutory withdrawal under the provisions of section six of the Northern Pacific Act.

Further on, in the opinion in the St. Paul case, it was said by the Court at p. 17:

> "Besides the withdrawal made by the Secre-
> "tary of the Interior of lands within the forty
> "mile limit on the the 13th of August 1870, pre-
> "served the lands for the benefit of the Northern
> "Pacific Railroad from the operation of any
> "subsequent grants to other companies not
> "specifically declared to cover the premises. The
> "Northern Pacific act directed that the President
> "should cause the lands to be surveyed forty miles
> "in width on both sides of the entire line of the
> "road, after the general route should be fixed, and
> "as fast as might be required by the con-
> "struction of the road, and provided that the
> "odd sections of land granted should not be
> "liable to sale, entry or pre-emption before or
> "after they were surveyed, except by the com-
> "pany. They were, therefore, excepted by that
> "legislation from grants, independently of
> "the withdrawal by the Secretary of the Interior.
> "His action in formally announcing their with-
> "drawal was only giving publicity to what the
> "law itself declared. The object of the with-
> "drawal was to preserve the land unencumbered
> "until the completion and acceptance of the road.

" * * * After such withdrawal no interest in
" the lands granted can be acquired against the
" rights of the company, except by special legisla-
" tive declaration, nor, indeed, in the absence of its
" announcement after the general route is fixed."

It will, we think, be conceded that the purpose of this land grant was to give to the railroad company the full amount of land within its place limits. In order to accomplish this, it seemed wise to Congress to withdraw all the odd-numbered sections of land granted to the company within forty miles of the road from sale, entry or pre-emption. This would preserve the indemnity as well as the place lands within the more thickly settled states from the operation of the Pre-emption Laws, but would not preclude settlers from pre-empting lands within the indemnity limits of the grants to the railroad when it passed through a Territory. No withdrawal of the indemnity lands in a Territory seemed necessary to Congress, because of the small deficiency likely to occur within the place limits, and because such small deficiency would probably be easily made good out of the indemnity limits, even if settlers were permitted to take up lands within such indemnity limits.

To put the matter in another form, the Atlantic and Pacific Act primarily related to a railroad which was expected to pass through Territories as well as States. Congress, therefore, enacted that a strip of forty miles

along the entire length of the road, whether passing through a Territory or a State, should be surveyed and withdrawn from the operation of the pre-emption laws. Then, in order to prevent any misunderstanding and mistake, it further provided that such withdrawal from the operation of the pre-emption laws did not apply to the lands beyond this forty-mile strip, for the obvious reasons which we have just stated.

It is difficult to see how any other purpose in the passage of this act can be attributed to Congress. If it had not been its intention to withdraw from sale and pre-emption the indemnity lands along the line of the road when it passed through a State, why did it not simply require that a strip of 20 miles should be surveyed along each side of the road passing through a State instead of requiring the same width to be surveyed in a State as in a Territory? Why should Congress have permitted this great expense of a 40-mile survey instead of a 20-mile survey, unless there was some reason for it?

There was no statutory survey and withdrawal enacted by Congress of lands in the Territories between the forty and fifty mile limits, and on the contrary the 6th section as we have understood it expressly provided that such lands should be subject to the operation of the pre-emption laws. Now, if there had been any intention that the lands within the forty-mile strip should also be open to sale and entry, why did Congress direct them to be surveyed?

In other words, Congress by directing a survey of all lands within forty miles of the road and declaring that the odd sections within such limits should not be liable to sale, entry or pre-emption, except by the railroad, did not contemplate drawing the fine distinction that only place lands were thus withdrawn from sale, but evidently intended that such withdrawal should cover all lands within the forty-mile limit, to which the act in any way related. What Congress had in mind was the forty-mile strip along the entire line of the road, and it is inconceivable that it should have intended to make a distinction between the lands in this strip, when it passed through a State or through a Territory, without saying so in so many words. It would have been so easy and so natural for Congress to say so, if it had been its intention to limit the withdrawal to the odd sections within twenty miles of the road, when it passed through a State, that it is difficult to believe that such a construction can be put upon this act in the absence of any definite words to that effect. That is to say, in a doubtful case such construction should be given to an Act of Congress as would tend to sustain a grant by Congress. At least, where there is any doubt as to the meaning of a law, that construction which would deprive the railroad of land given to it under the Act of 1866 should not be preferred to a construction which would sustain the gift of the Government.

We know of no case in this court in which the words "land hereby granted" has ever been defined, but,

in the lower courts, it has been up for consideration more than once, and Mr. Justice BREWER, when Circuit Court Judge, has twice decided that the words "land hereby granted" were in no way limited in their meaning to lands within the place limits of a railroad grant, but included lands within the indemnity limits as well.

Northern Pacific R. Co. vs. United States, 36 Fed. Rep., 282-287.

Barney vs. Winona & St. P. R. Co., 24 Fed. Rep., 889.

An independent examination of this question without regard to any authority can but result in the conclusion that the words "land hereby granted" have as much application to land within the indemnity limits of a railroad grant as to lands within the place limits.

The meaning of the words "land hereby granted" is perhaps as well ascertained by asking how and in what way and under what act the railroad could acquire its title to the indemnity lands, unless it was by the Atlantic and Pacific Act. If such lands are not granted to the railroad by the Act of July, 1866, then how does it derive its right thereto. The source of the title to the land within the indemnity limits is, we think, necessarily the same as the source of the title to the land within the place limits. The only difference is as to the manner in which the title is acquired. The land within the place limits is acquired by and at the time of filing a map of general route. The title to the land within the indemnity limits is acquired by selection.

The procedure is different in the two cases, but the source of title is the same, viz.: the Act of July, 1866.

It is of considerable interest that the Interior Department has construed the phrase "land hereby granted" as including land within the indemnity limits as well as land within the place limits of a railroad grant, and in the case of Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 9 L. D., 465-468, Secretary Noble said:

> "But it is urged that by the use of the expres-
> "sion 'grant of lands' Congress meant really
> "granted lands, or lands within the primary limits
> "of the grant. I cannot concur in this view. The
> "history of the legislation of Congress will doubt-
> "less show many instances wherein *indemnity*
> "and lands other than place lands are referred to
> "as *granted* lands. One or two instances suggest
> "themselves to me, and may be briefly referred to.
>
> "By the ninth section of the Texas Pacific act
> "(16 St., 576) it is provided that, if in the too
> "near approach of said railroad to the Mexican
> "border the number of sections to which the
> "company is entitled cannot be selected on the
> "line of the road, then a like quantity of land
> "may be selected elsewhere, 'provided that no
> "'public lands are *hereby granted* within the State
> "'of California further than twenty miles on each
> "'side of said road, except to make up deficiencies
> "'as aforesaid.'

"Here *indemnity lands* to be selected for other "lost indemnity lands are included in the category "of lands 'hereby granted.' Also in the case of "the Burlington and Missouri River grant, the "only one of quantity without lateral limits now "recalled, and where the land is to be obtained "by *selection* anywhere along the line of the road, "the language of the act is, that (Sec. 19, Act July "2, 1864, 13 St., 356) 'there be and hereby is "'*granted*,' provided the company accept '*this* "'*grant*' within one year, when the Secretary "'shall *withdraw* the lands embraced in *this grant* "'from market.' And the Supreme Court in 98 "U. S., 334, construing the act, speak of it all the "way through as a '*grant*,' and of the lands as "'*granted lands*,' and uphold the right of the "company to select them anywhere along the "general direction of the road within lines per- "pendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, Barney vs. "Winona, it was held that the expression 'lands "'which may have been *granted* to the Territory "'or State of Minnesota,' includes *all lands*, the "title to which had passed to the Territory or "State of Minnesota, whether these lands were "lands in place or *indemnity* lands, and the word "*granted* has the broad, rather than the narrow "signification.

"So in the St. Paul vs. Winona Railroad, 112 "U. S., 730, referring to the significant fact that

" both acts there quoted speak of additional sec-
" ' tions to be *selected*, a word wholly inapplicable
" ' to lands in place,' the Court says, ' we think,
" ' therefore, that these *additional lands granted*
" ' to the appellant * * * are lands to be
" ' selected,' etc.

" These citations, doubtless, might be multi-
" plied largely, but they are sufficient, inasmuch as
" they show that the expressions ' *lands granted*,'
" ' *granted lands*,' ' *lands within the grant*,' and
" similar expressions, have not such narrow
" and technical meaning as to restrict the use of
" them to lands in place, or within the primary
" limits of a grant. On the contrary, such expres-
" sions are to be construed liberally and broadly,
" not standing alone, but in connection with the
" whole context of the act, and its true meaning
" gathered therefrom. Therefore, on a full con-
" sideration of the subject, I am of the opinion
" that when Congress spoke of the failure of the
" Commissioner of the General Land Office to
" ' have the lands withdrawn from market ' em-
" ' braced in the grant of lands,' etc., it meant
" the lands in both the primary and indemnity
" limits."

We refer to this decision of the Secretary of the Interior as of some importance because of the ruling in Hewitt vs. Schultz, 180 U. S., 139, where it was held that the decisions of the Interior Department were to be

followed in any question of doubt. The Interior Department has construed the words "land hereby granted" as including land within the indemity limits as well as land within the place limits, and its ruling is therefore entitled to consideration by this Court in determining the construction to be put upon these words.

As we read the case of Wood vs. Beach, 156 U. S., 548, this Court substantially defines these words as they were construed by Secretary Noble. Mr. Justice BREWER, at page 551, in speaking of the plaintiff in the case, said :

> "He deliberately took the chances of the rail-
> "way company's *grant* being satisfied out of
> "lands within the place limits or by selections of
> "lands within the indemnity limits other than
> "this, and trusted that in such event this tract
> "would be restored to the public domain and he
> "gain some advantage by reason of being already
> "on the land."

As this case is to be argued with the case of Southern Pacific Railroad Company v. Bell, No. 20, it does not seem necessary to repeat what we have said in the brief in that case, to which we respectfully refer the Court.

## SECOND POINT.

**There was no laches on the part of the railroad in making the selection of the land in controversy.**

We have never quite understood the force of this contention of laches on the part of the railroad. The eighty acres in question were opposite to and coterminous with the line of road between Huron and Alcalde. A map of the definite location of this section of the railroad was filed with and approved by the Secretary of the Interior on April 2, 1889, and the president accepted and approved the Commissioner's report on November 8, 1889. Something over a year and a half after the approval of this section of the railroad, and on July 13, 1891, the appellant selected the eighty acres in question. The railroad company was first in a position to make a selection of the land in controversy in November, 1889. It made such selection in July, 1891. It is not plain how a delay of a year and a half in the exercise of such an important right can be considered laches on the part of the railroad.

It seems to us that this entire question of laches is completely disposed of by the decision in this case of the Circuit Court of Appeals for the Ninth Circuit, which does not appear in this record, but which will be found in 87 Fed. Rep., 970, where it was said at page 974:

"The laches is said to consist in the long delay "of the railroad company in constructing the "road and selecting the indemnity lands. We are "unable to perceive how that delay has conferred "rights upon the pre-emption settler, or how it "now affords him ground to impute inequity to "the company. The company owed no duty to "any intended settler upon the public domain. "The United States did not offer this land to "Groeck, nor did it invite his occupancy or entry. "He was a trespasser on the premises. His pre-"emption entry was not only void, but it was "unlawful. Neither such an entry nor the pay-"ment of the purchase price nor the issuance of "the patent could place him in a position to "plead laches, as against the title asserted by "the railroad company. Said the court in Wood "vs. Beach:

'It is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make his unauthorized entry the foundation of an equitable title.'

"The appellees cite and rely upon the cases of "Railroad Company v. Herring, 110 U. S., 27, 3 "Sup. Ct., 485, and Galliher v. Cadwell, 145 U. S., "368, 12 Sup. Ct., 873.

"In the first of these cases the grant to the rail-"road company provided for the withdrawal when

" a map definitely showing the line of road " should be filed. The map was not filed until " three years and a half after the passage of the " act. During this period homestead and pre- " emption entries were made. The Court held " that no obligation rested upon the government " to withdraw the lands from sale until the grantee " filed a map in the general land office, definitely " showing the entire line of its road, and that in " the meantime the lands were open to pre-emp- " tion and homestead entry. It is readily seen " that the facts in that case clearly distinguish it " from the case at bar. In Galliher vs. Cadwell, " it was said by the Court:

" ' Laches is not, like limitation, a mere matter " ' of time, but principally a question of the in- " ' equity of permitting the claim to be enforced— " ' an inequity founded upon some change in the " ' condition or relation of the property or the " ' parties.'

" There are no facts in the present case to " which that language was applicable. The appel- " lant and Groeck were not in the attitude of per- " sons to whom the land in controversy was offered " upon equal terms, giving to the first entryman " the prior right. It was offered only to the rail- " road company. The facts stated in the bill and " in the plea are insufficient to show that the com- " pany has in any respect dealt inequitably with " Groeck. This is not a case in which it has

" delayed enforcing its rights to the detriment of
" another. The delay in constructing the road
" and in selecting the lieu lands has
" worked no wrong to Groeck. So
" long as the United States made no
" complaint of the delay, no equity was created
" thereby in favor of any intending settler. And
" no such settler could take it upon himself to say
" that the grantee had forfeited any of the rights
" specified in the grant. The Company was not
" required to give Groeck notice of its rights in
" the premises. He was bound to take note of the
" law which itself gave him notice. In short, no
" facts exist on which laches may be imputed to
" the railroad company for any delay upon its
" part short of the statutory period of limitation
" whereby its right to obtain the relief sued for
" would be absolutely barred. The suit was
" brought within less than three years after definite
" location, which was the earliest time when selec-
" tion could have been made, in less than two
" years after the issuance of Groeck's patent, and
" within less than one year after selection was
" made."

## THIRD POINT.

**The judgment of the Court below should be affirmed.**

L. E. Payson,
Maxwell Evarts,
Of Counsel for the Appellee.

# Supreme Court of the United States.

No. 82.—October Term, 1901.

Otto Groeck et al., Appellants, vs. The Southern Pacific Railroad Company. } Appeal from the Circuit Court of Appeals for the Ninth Circuit.

[January 13, 1902.]

This was a bill in equity filed in the Circuit Court for the Southern District of California by the Southern Pacific Railroad Company, plaintiff, against Otto Groeck and another, defendants, to obtain a decree declaring the company to be the rightful owner of the south half of a certain quarter section of land in Kings County, California, and that defendants hold the legal title thereto in trust for it, a conveyance of which was prayed.

The amended bill, as abstracted by the Circuit Court of Appeals, (87 Fed. Rep. 970,) alleged: "That the appellant accepted the terms of the grant, fixed the general route of its road as contemplated by the act, and on January 3, 1867, filed a map thereof in the office of the Commissioner of the General Land Office; that on that date the Commissioner accepted and approved the map and the route designated by it, and on March 22, 1867, under the direction of the Secretary of the Interior, he withdrew the odd sections of land lying within thirty miles of the line of road from sale or location, pre-emption or homestead entry; that on November 2, 1869, the Secretary of the Interior made an order declaring the withdrawal revoked; that on December 15, 1869, the Secretary suspended his order of November 2; that on July 26, 1870, the Secretary restored the withdrawal of March 22, 1867; that on August 15, 1887, the Secretary declared the withdrawal of March 22, 1867, revoked, as to the indemnity sections thereof; that the appellant commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889—the last section, extend-

ing from Huron westerly to Alcalde, having been constructed during the year 1888; that the land in suit is opposite to and coterminous with that section, and is within the indemnity limits of the grant, and is not included in any exception therefrom; that on September 2, 1885, the appellee Groeck settled on the land in controversy, and during the same month filed his pre-emption claim therefor in the proper land office of the United States, and thereafter complied with the land office regulations, and on June 7, 1886, made pre-emption proof and payment for the land; that on April 11, 1890, patent was issued from the United States, conveying the land to him; that, as the appellant's road was constructed in several sections, such sections were examined by commissioners appointed by the President, as provided by section 4 of the act, and that said commissioners reported that such sections had been completed as required by the act, and thereupon the President accepted and approved the reports; that a map of the definite location of such section between Huron and Alcalde was filed with and approved by the Secretary of the Interior on April 2, 1889, and the President accepted and approved the commissioners' report on that section on November 8, 1889; that on July 13, 1891, the appellant, acting under the direction of the Secretary of the Interior, selected the land in suit as granted to it by the act."

To this bill defendants interposed a plea setting up the various steps by which the defendant Groeck obtained the patent of the land as a qualified pre-emptor, and thereby, as alleged, obtained a legal and perfect title in fee simple; and further setting up the defense of laches to the claim of the railroad company.

The Circuit Court entered an order sustaining the plea upon the ground of laches, with leave to the company to reply to the plea and take issue as to the matters of fact therein alleged. (74 Fed. Rep. 585.) The company having declined to avail itself of this privilege, the Circuit Court ordered the bill to be dismissed. Whereupon the railroad company appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court and remanded the case for further proceedings. (87 Fed. Rep. 970.) The case coming on again for hearing a decree was rendered for the plaintiff; another appeal taken to the Court of Appeals, and the decree of the Circuit Court affirmed.

Mr. Justice BROWN delivered the opinion of the Court.

This case resembles the one just decided in all its essential particulars and is controlled by it.

The decrees of both courts are therefore reversed and the case remanded to the Circuit Court for the Southern District of California with directions to dismiss the bill.

True copy.

Test:

*Clerk Supreme Court, U. S.*